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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-592

NORTHWEST STEELHEADERS COUNCIL
OF TROUT UNLIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA,
QUINALT TRIBE OF INDIANS, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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October 17, 1975

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No.

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Petitioner,

v.

UNITED STATES OF AMERICA,
QUINALT TRIBE OF INDIANS, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Northwest Steelheaders Council of Trout Unlimited respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1975, and the order denying the

application for rehearing en banc entered in this proceeding on July 23, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are included in the Appendix of petitioners, the state of Washington, and are incorporated by reference herein.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1975. A timely petition for rehearing en banc was denied on July 23, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. Is the decision of the Ninth Circuit enjoining the state of Washington from managing its salmon and steelhead resource contrary to the decision of this Court in

Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973), and to nine earlier decisions of this Court?

2. Is the decision of the Ninth Circuit allowing certain treaty tribes the extra-territorial right of self-regulating their own off-reservation fishery in the waters of western Washington contrary to the decision of this Court in Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916)?

3. Is the decision of the Ninth Circuit allowing the District Court to act as perpetual fishmaster of the salmon and steelhead resource of western Washington contrary to the decision of this Court in Milliken v. Bradley, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974)?

4. Is the decision of the Ninth Circuit that limits conservation of the salmon and steelhead resource only to regulations indispensable to spawning escapement contrary

to the decision of this Court in Puyallup Tribe v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689, reh. den. 393 US 898, 89 S Ct 64, 21 L Ed 2d 185 (1968) as reaffirmed in Antoine v. State, ____US___, 95 S Ct 944, 43 L Ed 2d 129 (1975)?

5. Is the decision of the Ninth Circuit in affirming a complex fish allocation formula as a matter of equitable discretion ignoring the rights of other people contrary to the decision of this Court in Department of Game v. Puyallup Tribe, Inc., supra, and in Minnesota State Senate v. Beens, 406 US 187, 92 S Ct 1477, 32 L Ed 2d 1 (1972)?

6. Should this Court accept certiorari when the decision of the Ninth Circuit conflicts with the Washington Superior Court decision on remand from this Court in Department of Game v. Puyallup Tribe, Inc., supra, and may conflict with the appeal from that decision which has been argued but not

yet decided by the Supreme Court of Washington?

7. Should this Court accept certiorari when the decision of the Ninth Circuit sanctions the District Court issuing injunctions which leave the officials of Washington State in violation of either state or federal court injunctions on the same subject?

8. Should this Court accept certiorari when the decision of the Ninth Circuit sanctions the District Court interfering with the international relations of the United States by issuing injunctions against the state of Washington requiring it to disobey orders of the International Pacific Salmon Fisheries Commission over the protests of the Government of Canada?

STATUTORY PROVISIONS INVOLVED

United States Indian Treaties

Tribe	Treaty
Hoh Indian Tribe ("Hoh Tribe")	Treaty with the Quinaeilt, et al. (Treaty of Olympia) July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971.
Lummi Tribe of Indians ("Lummi Tribe")	Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927.
Makah Indian Tribe	Treaty with the Makah (Treaty of Neah Bay), January 31, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat 939.
Muckleshoot Indian Tribe ("Muckleshoot Tribe")	Treaty of Point Elliott, supra, and also Treaty of Medicine Creek, December 26, 1854, ratified March 3, 1855, and proclaimed April 10, 1855, 10 Stat. 1132.
Nisqually Indian Community of the Nisqually Reservation ("Nisqually Tribe")	Treaty of Medicine Creek, supra.

Tribe	Treaty
Puyallup Tribe of the Puyallup Reservation ("Puyallup Tribe")	Treaty of Medicine Creek, supra.
Quileute Tribe of the Quileute Reservation ("Quileute Tribe")	Treaty with the Quinaeilt, et al, supra.
Quinault Tribe of Indians ("Quinault Tribe")	Treaty with the Quinaeilt, et al., supra.
Sauk-Suiattle Indian Tribe ("Sauk-Suiattle Tribe")	Treaty of Point Elliott, supra.
Skokomish Indian Tribe ("Skokomish Tribe")	Treaty of Point No Point, January 26, 1855, ratitifed March 8, 1859 and proclaimed April 29, 1859, 12 Stat. 933.
Squaxin Island Tribe of Indians ("Squaxin Island Tribe")	Treaty of Medicine Creek, supra.
Stillaguamish Indian Tribe ("Stillaguamish Tribe")	Treaty of Point Elliott, supra.
Upper Skagit River Tribe ("Upper Skagit Tribe")	Treaty of Point Elliott, supra.

Tribe	Treaty
Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation")	Treaty with the Yakimas, June 9, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 951.

Revised Code of Washington

75.08.260
75.12.060
75.12.070
75.12.160
75.40.060
77.08.020
77.12.100
77.12.130
77.16.020
77.16.030
77.16.040
77.16.060

STATEMENT OF THE CASE

The United States brought this suit for declaratory and injunctive relief against the state of Washington to determine the treaty fishing rights of western Washington Indian tribes. The 1854 and 1855 Treaties each contain language similar to the following:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, [Two treaties, Point No Point, 12 Stat. 933, and Treaty with Makahs, 12 Stat. 939, refer to citizens of the United States] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries,....on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens." (12 Stat 971, 927, 939, 933, 951, 10 Stat. 1132)

The District Court for the Western District of Washington allowed the intervention of fourteen Indian tribes but denied the intervention of all commercial and sports fishing groups. One commercial group, the Reefnetters, were allowed to intervene by another judge.

The case deals with the anadromous fish resource of western Washington.

Salmon and steelhead spawn on the banks of the clear mountain rivers that originate on the slopes of the Cascade Mountain range.

They migrate to the Pacific Ocean and spend most of their lives swimming in salt water. Then they return usually to the very stretch of river where they were born in order to reproduce, at which point the salmon die, though a small percentage of the steelhead may still live. On the way home they may have to overcome the swift currents of nature or the fish ladders of man.

In 1971, the Washington steelhead catch was 264,599, while the salmon catch in Washington was 7,777,093.

Most of the salmon are caught in marine areas by commercial fishermen who sell them to packers who in turn ship them all over the world. The sports salmon catch is in Puget Sound or other ocean waters since salmon usually do not bite and are not too tasty if caught in the rivers on the way back to spawn.

Steelhead are ocean going rainbow trout

similar to the trout caught in lakes around the country but usually grow to be much larger in ocean waters. (Special Publication No. 2 (Third Edition, 1970) of the American Fishery Society, A List of Common Scientific Names for Fishes from the United States and Canada, 17). Steelhead are a game fish under Washington law which means that they can only be caught by hook and line and cannot be legally caught in the nets of the commercial fishermen, RCW 75.04.070. Since the decision of the United States Supreme Court in Department of Game v. Puyallup Tribe, Inc., supra, steelhead are subject to taking in the nets of the treaty Indian fishermen which are usually downstream, i.e. ahead of the recreational angler.

Salmon are caught in Atlantic and Pacific waters and even in the Great Lakes, ROYCE, INTRODUCTION TO THE FISHERY SCIENCES,

91 (1972). Steelhead trout originate only in the rivers of the Pacific Northwest.

In western Washington there are 794 treaty Indian fishermen, 6,600 commercial fishermen, and 283,650 sports fishermen.

In the First Final Decision, the District Court decided:

1. The fourteen tribes have the right to fish for salmon and steelhead off reservation at their "usual and accustomed grounds and stations," which were defined in the opinion.

2. The state of Washington may not regulate the treaty Indian off-reservation fishery for any reason without first submitting the proposed regulations to the District Court for approval.

3. The District Court will only consider approving regulations necessary to assure proper escapement of fish for spawning and not for any other conservation

reason.

4. Tribes which the District Court finds to be qualified for self-regulation may not have their off-reservation fishing regulated by anyone.

5. The words "in common" in the treaties reserve to the treaty tribes the right to these fish:

a) All the fish they can catch on reservations; plus

b) All the fish they can eat; plus

c) All the fish they can use for ceremonies; plus

d) Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations;"plus

e) All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

f) All the fish they can catch with commercial gear anywhere in Washington

away from "usual and accustomed grounds and stations;" plus

g) Extra fish to replace the fish that do not reach the "usual and accustomed grounds and stations."

6. All other fishermen have no rights to fish but only a privilege.

7. The question of whether hatchery propogated fish paid for with the license fees and tags of sports fishermen are included within the treaty fishery is deferred initially to the state courts on remand from this Court in Department of Game v. Puyallup Tribe, Inc., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973).

8. The District Court retained continuing jurisdiction.

The state of Washington appealed to the Ninth Circuit and the tribes cross appealed on the ground that no one could regulate their off-reservation fishery whether or

not they were "qualified" to be self-regulating. Northwest Steelheaders Council of Trout Unlimited, the largest sports fishing conservation organization in Washington, was allowed to intervene by the Ninth Circuit.

All parties briefed and argued to the Ninth Circuit the events that have occurred during the continuing jurisdiction phase. Here are some of the major rulings:

1. The hatchery fish are being included within the treaty fishery even though the state Superior Court has ruled to the contrary. The District Court says that it will only consider the matter after the Supreme Court of Washington has ruled.

2. The District Court is now supervising the allocation of fish by the state of Washington among non-Indian treaty fishermen.

3. The Indian treaty fishermen are

being allocated not fishing opportunities but specific numbers or percentages of fish. The steelhead sports fishery is primarily in the rivers up-stream from the Indian nets. On the Nisqually River in 1974, for example, the District Court awarded the Nisqually Tribe 72% of the steelhead catch plus ceremonial, subsistence, hook and line, ocean commerical and compensatory fish leaving the sports fishermen the chance of later catching what remains.

4. The District Court is including the "historic" reservation catch in the allocation and has ruled that on some rivers this could mean 100% of the harvestable run.

5. The District Court has issued injunctions against state courts and ordered the state not to comply with regulations of the International Pacific Salmon

Fisheries Commission, which manages the Fraser River salmon run in accordance with a 1937 Treaty between the United States and Canada (50 Stat. 1355).

The Ninth Circuit with one modification affirmed the decision of the District Court and Northwest Steelheaders Council of Trout Unlimited files this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

INTRODUCTORY

The basic thrust of the decisions of the District Court and the Ninth Circuit is that the state of Washington cannot be trusted to protect the rights of its citizens with treaty Indian fishing rights. The District Court found that there were 794 commercial Indian fishermen including part time fishermen, spouses and minor children. The total Indian population of Washington is 36,400, and the total population of all citizens is 3,424,300. U.S.

Statistical Abstract, U.S. Bureau of the Census, 1973.

The annual salmon catch alone has a yearly value of about $71,821,557. Department of Fisheries 1973 Annual Report. If the 794 Indian commercial fishermen get only fifty percent of the catch, each will have an annual income of over $45,000 for a few months of salmon fishing. For a family of five, all of whom participate in the fishing, this means $225,000 a year.

These petitioners, who are representative of sports fishermen, are neutral on the issue of the proper allocation of the comercial portion of this fishery between treaty Indian and non-treaty commercial fishermen.

The treaties are the solemn obligations of the United States and must be respected. Petitioners do not quarrel with the basic agreement that the treaty tribes have a

special fishery at usual and accustomed grounds and stations off-reservation, which may be regulated by the state only in the interest of conservation. Such a decision was made for the Columbia River in the United States District Court for the District of Oregon in 1969 involving the same treaties. The case was not appealed[1/] and is working well. Sohappy v. Smith (United States v. Oregon), 302 F Supp 899 (D. Or. 1969). But there the District Court recognizes that it cannot be a fishmaster. Management decisions are made for the Columbia River fishery by the "Compact" Commission, a joint body of the Oregon and Washington fish management agencies. The District Court retains continuing jurisdiction. The tribes appear before the Compact Commission and present their

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1/ A later appeal was taken on a separate issue in 1974.

views. If they believe that their special treaty rights are being violated, they can and do immediately get review and sometimes changes from the District Court. The District Court has also on occasion remanded questions to the Compact Commission for further consideration with court guidelines.

The District of Oregon experience is completely different from the horror story that is occurring in the Western District of Washington which is the basis of this petition for certiorari.[2/]

This is not a civil rights case. We are not here faced with the equal protection

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2/ Since the Ninth Circuit decision in U.S. v. Washington, the Oregon Court is exploring the extent to which it is bound by the Ninth Circuit decision which interprets the same treaties, but has a different factual record, for any exercise of equitable relief.

of the laws problem implicit in every civil rights case. Rather we are concerned with defining the special protection afforded by the treaties.

This is a conservation case. We are dealing with the protection of a diminishing resource of immense value. We respectfully urge this Court to consider this petition for certiorari with this in mind.

A. TO PREVENT THE USURPATION OF THE RIGHT OF WASHINGTON TO MANAGE AND CONSERVE ITS SALMON AND STEELHEAD RESOURCE.

Good management and conservation of the fragile salmon and steelhead resource requires expert unified state management. The decisions of the District Court and Ninth Circuit take this right and responsibility away from Washington and transfer it to a federal judge who is to act as perpetual fishmaster. Later on the federal judge will supervise only the state of Washington

while up to twenty-six separate Indian tribes will regulate their own fishing without supervision by anyone. The chaos that has already been created can only increase. Bad fish management cannot be good law.

1. THE DECISION OF THE NINTH CIRCUIT ENJOINING THE STATE OF WASHINGTON FROM MANAGING ITS SALMON AND STEELHEAD RESOURCE IS CONTRARY TO THE DECISION OF THIS COURT IN DEPARTMENT OF GAME v. PUYALLUP TRIBE, INC., 414 US 44, 94 S Ct 330, 38 L Ed 2d 254 (1973), (PUYALLUP II), AND CONTRARY TO NINE EARLIER DECISIONS OF THIS COURT.

The United States Constitution provides in the Tenth Amendment that:

> "Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

In Puyallup Tribe v. Department of Game, 391 US 392, 88 S Ct 1725, 20 L Ed

2d 689 reh. den. 393 US 898, 89 S Ct 64, 21 L Ed 2d 185 (1968), (Puyallup I) this Court in construing the Treaty involved in this case points out:

> "And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power....But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation provided the regulation meets appropriate standards and does not discriminate against the Indians...
>
> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 US 392 at 398, 399 (1968)).

This holding was approved in Puyallup II, supra.

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. McCready v. Virginia, 94 US (4 Otto) 391, 24 L Ed 248, (1876); Manchester v. Massachusetts, 139 US 240, 11 S Ct 559, 35 L Ed 159 (1891); Ward v.

Race Horse, 163 US 504, 16 S Ct 1076, 41 L Ed 244 (1896); U.S. v. Winans, 198 US 371, 25 S Ct 662, 49 L Ed 1089 (1905); Kennedy v. Becker, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916); Lacoste v. Dept. of Conservation, 263 US 545, 44 S Ct 186, 68 L Ed 437 (1924); Tulee v. Washington, 315 US 681, 62 S Ct 862, 86 L Ed 1115 (1942); Organized Village of Kake v. Egan, 369 US 60, 82 S Ct 680, 7 L Ed 2d 573 (1962).

Contrary to these ten decisions of this Court, the Ninth Circuit held that the state of Washington cannot in perpetuity regulate treaty fishing EVEN WHEN LIMITED TO "THE INTEREST OF CONSERVATION" without the "advance judicial scrutiny" of the District Court. The Tenth Amendment reservation of the sovereign power of Washington becomes a recommending function. As to certain "self-regulating" tribes, the Ninth Circuit goes further and says that their

fishing may be regulated by no one. (The Opinion of the Ninth Circuit has not yet been reported, but has been reproduced in the Appendix to the brief of the petitioner, the State of Washington.)

The Puyallup cases require that state "regulation meet appropriate standards and does not discriminate against the Indians." (391 US 392 at 398) The District Court and Ninth Circuit in this case did not define appropriate standards for state regulation as mandated by this Court. Instead, they took away the right of Washington to manage its salmon and steelhead resource.

2. THE DECISION OF THE NINTH CIRCUIT ALLOWING CERTAIN TREATY TRIBES THE EXTRATERRITORIAL RIGHT OF SELF-REGULATING THEIR OWN OFF-RESERVATION FISHERY IN THE WATERS OF WESTERN WASHINGTON IS CONTRARY TO THE DECISION OF THIS COURT IN KENNEDY v. BECKER, 241 US 556, 36 S Ct 705, 60 L Ed 1166 (1916).

The Ninth Circuit held that certain

"qualified" tribes have the right "to regulate their own members in the interest of conservation free of state controls." The District Court wants all of the tribes in time to be self-regulating. The Ninth Circuit argues that "In a sense, the treaty cloaks the Indians with an extra-territoriality while fishing at these locations."

This holding is contrary to Kennedy v. Becker, supra, where this Court allowed New York to regulate the off-reservation hunting and fishing of the Seneca Tribe. The Tribe argued that it had sole sovereignty over its members when they were hunting and fishing on former tribal land conveyed with a reservation of the continuing right to hunt and fish. This Court there had to deal with the identical argument for extraterritoriality that is made by the Ninth Circuit in our case.

This Court said:

> "It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both." (241 US 556, at 563.)

Kennedy v. Becker was recently cited with approval in Puyallup I.

Possibly the most important precept of fishery science is the need for unified management of the resource. Two tribes are now self-regulating. Twelve more tribes were plaintiffs and the District Court also wants them to be self-regulating as soon as possible. This means that the following rivers can be completely and separately regulated as to season, area, gear, catch, or anything else by more than one tribe, with any coordination with the state of Washington or each other completely voluntary:

Puyallup River - Muckleshoot Tribe, Puyallup Tribe and Yakima Tribe

Hoh River - Hoh Tribe, Quileute Tribe

Dickey River - Hoh Tribe, Quileute Tribe

Bogachiel River - Hoh Tribe, Quileute Tribe

Colawah River - Hoh Tribe, Quileute Tribe

Soleduck River - Hoh Tribe, Quileute Tribe

Queets River - Hoh Tribe, Quinault Tribe

Quinault River - Hoh Tribe, Quinault Tribe

Big River - Makah Tribe, Sauk-Suiattle Tribe

Ozette Lake - Makah Tribe, Quileute Tribe

Carbon River - Muckleshoot Tribe, Yakima Tribe

Strick River - Mucklesoot Tribe, Yakima Tribe

White River - Muckleshoot Tribe, Yakima Tribe

Green River - Muckleshoot Tribe, Yakima Tribe

Black River - Muckleshoot Tribe, Yakima Tribe

Nisqually River mouth and surrounding bay - Nisqually Tribe, Yakima Tribe

Since many tribes are quite small, e.g., the Hoh Tribe has 62 members, Nisqually - 61, Stillaguamish - 94, much of the burden of regulation and enforcement will have to be handled by the commercial Indian fishermen themselves, who can have little objectivity about their own short-run economic interest.

The District Court has now established fishing rights for six additional tribes and five tribes have pending applications before the Court. This can cause even further duplicate and conflicting management over the same fish in the same rivers.

The Ninth Circuit notes that Kennedy v. Becker, supra, rejects "dual sovereignty" and agrees that the state "ordinarily" has the power to regulate. It then argues, "However, the district court has enjoined

the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy" (No citation provided). But any such Congressional policy must yield to the Constitution. The federal courts may only require that Washington exercise this power in ways that comply with Indian treaties.

3. THE DECISION OF THE NINTH CIRCUIT ALLOWING THE DISTRICT COURT TO ACT AS PERPETUAL FISHMASTER OF THE SALMON AND STEELHEAD RESOURCE OF WESTERN WASHINGTON IS CONTRARY TO THE DECISION OF THIS COURT IN MILLIKEN v. BRADLEY, 418 US 717, 94 S Ct 3112, 41 L Ed 2d 1069 (1974).

The Ninth Circuit requires "advance judicial scrutiny of all future state regulations affecting Indian treaty fishing rights." The District Court under its continuing jurisdiction has now gone further and entered an injunction against a Washington state court decision allocating a portion of the non-Indian treaty catch. This means

that the District Court will be the perpetual fishmaster of all fishing in western Washington by all user groups.

The concurring Ninth Circuit opinion recognizes "ratification of the role of the District Judge as a 'perpetual fishmaster,'" but argues that this is necessary because of the past denial of Indian rights. Actually, the District Court found a decade of cooperation with the tribes by the Washington Department of Fisheries. (384 F Supp 312, 392) The Department of Game sought to enforce the state statute making steelhead a game fish until instructed to the contrary by this Court in Puyallup II in November, 1973. Thereafter, the Department of Game immediately set a special commercial net season for the Puyallup Tribe.

The District Court decision as affirmed by the Ninth Circuit for the first time

quantified the Indian treaty fishing right by a specific allocation of fish. This had not been done for the first 119 years of the treaties. In other words, the plaintiff tribes acquired newly defined rights in this case. The only way there could be any justification for a federal judge acting as perpetual fishmaster is if there was a showing that the state of Washington will not carry out this decision, as it is ultimately defined by this Court. There is no such showing.

Fisheries management is a job for experts. The Washington Department of Fisheries for example, has 61 trained biologists among its 376 permanent employees and a total annual budget of $14,000,000 for its fisheries program. Department of Fisheries Operating Budget Program Summary, 12/4/73. The Department of Game has a total staff of 468, a fisheries budget of $2.4 million

and many trained biologists. Annual Report of Department of Game, July 1, 1972 - June 30, 1973, and 21st Biennial Report of Department of Game.

The Department of Fisheries makes over a hundred regulatory decisions a year, almost all of which are decided in an atmosphere where time is of the essence. Even modern computer technology cannot guarantee knowledge of when a run of fish will actually enter a river until the last moment.

A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed, CRUTCHFIELD and PONTECORVO, THE PACIFIC SALMON FISHERIES, A STUDY OF IRRATIONAL CONSERVATION, 167.

For example, starting in 1880 mistaken estimates of escapement needs and

overfishing by commercial fishermen virtually eliminated salmon in Southern California, NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974).

The Senior United States District Judge who is maintaining continuing jurisdiction in this case is not trained in the science of fish management. He has also been unavailable for long stretches of time when decisions that he reserved to himself had to be made. He was out of the jurisdiction and for a while in Africa and unavailable for judicial business from mid-September to mid-November, 1974 during part of the salmon season. He was out of the jurisdiction sitting in Nevada from December 2 to December 20,1974, during the winter steelhead season. For example, when the Department of Fisheries sought to limit the herring roe fishery to assure adequate spawning escapement, the Lummi Tribe opened a season for them-

selves and in 45 days took over 5.2 million pounds of herring. The Department of Fisheries sought an early injunction from the District Court but by the time the court would finally hear the matter, the fishing was finished and the matter moot.

Treaty Indians can place their nets across the entrances of the following fish hatcheries constructed and maintained by the state of Washington, which are located in their usual and accustomed grounds and stations:

1. George Adams - Skokomish Tribe.
2. Nooksak - Lummi Tribe.
3. Green - Muckleshoot and Yakima Tribes.
4. Puyallup - Puyallup and Nisqually Tribes.
5. Minter Creek - Puyallup Tribe.
6. Hood Canal - Skokomish Tribe.
7. Skagit - Skagit Tribe.
8. Chambers Creek - Nisqually and Puyallup Tribes.

Fishing at hatchery entrances can ruin the hatchery program by taking fish needed for eggs.

Every tribe with a reservation at or near the mouth of a river can put a fish trap across the river and catch every fish that enters the river. This includes reservations on the Sooes, Queets, Puyallup, Quinalt, Skokomish, Snohomish and Nooksack Rivers.

Recently, on September 13, 1975, by minute order dictated from New York City, the District Court appointed a committee to take over the regulatory decision making of the State Department of Fisheries on the Fall coho run. No one knows what will happen next.

In the case of Milliken v. Bradley, supra, this court struck down a school desegregation plan which would have required perpetual regulation by the District Court.

This Court there stresses:

> "But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first a de facto 'legislative authority' to resolve these complex questions,and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives." (94 S Ct 3112, at 3126, 3127)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> "Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default." (94 S Ct 3112, at 3158)

> "Furthermore, there is no basis whatever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most important, in the best interest of quality education for all of the children in the Detroit metropolitan area." (94 S Ct 3112, at 3159).

The Ninth Circuit's ratification of a perpetual fishmaster for western Washington is thus contrary to both the majority and dissenting opinions in the Milliken v. Bradley case. It does not give the state of Washington the opportunity of developing a proper plan for protecting Indian treaty rights as defined by the courts.

4. THE DECISION OF THE NINTH CIRCUIT THAT LIMITS CONSERVATION OF THE SALMON AND STEELHEAD RESOURCE ONLY TO REGULATIONS INDISPENSABLE TO SPAWNING ESCAPEMENT IS CONTRARY TO THE DECISION OF THIS COURT IN PUYALLUP I AS REAFFIRMED IN ANTOINE v. STATE, ___ US ___, 95 S Ct 944, 43 L Ed 2d 129 (1975).

This Court in the Puyallup cases reaffirmed the right of the state of Washington to regulate the fishing of the treaty tribes in the interest of conservation, but did not define conservation. The closest that this Court came was in footnote 14 in Puyallup I, where it rejected the definition of the Ninth Circuit in an earlier case that,".....the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

Thereafter, the Supreme Court of Washington defined conservation in Puyallup II; and the definition was not commented upon by this Court in its reviewing decision:

> "Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, one, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. Two, the manner of fishing, itself, must be such that you can control it so that you do not dip into the seed stock ....

> The other thing is that the manner of fishing itself, must not be destructive." Department of Game v. Puyallup Tribe, Inc., 80 Wn 2d 561, 569, 497 P 2d 171, 177 (1972).

In this case, the District Court based on the agreement of the experts who testified before it defined conservation this way:

> "From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use." (384 F Supp 312 at 385)

But after recognizing that this was good fish biology and management, the District Court and the Ninth Circuit then inconsistently limited the power of the state to regulate treaty fishing of non-self-regulating tribes after advance judicial scrutiny to measures necessary for spawning escapement. The Ninth Circuit cited Antoine v. State, supra, in support of its limited definition. But Antoine v.

State did not raise conservation issues. This Court there merely restated the Puyallup rule that state regulation of Indian treaty fishing must be reasonable and necessary for conservation.

So all that is known is that the indispensability test rejected by this Court has again been resurrected by the Ninth Circuit.

This is not a play on words. The Ninth Circuit and District Court will only allow the state of Washington to determine for each run how many fish must escape the treaty Indian nets to allow for adequate spawning. Here are some examples of other conservation needs which are therefore beyond the regulatory power of Washington, unless the Ninth Circuit is reversed:

1. The regulation of mesh size in salmon fishing can prevent an incidental catch of the steelhead which are smaller.

2. The regulation of the timing of a fishing season can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, or fish will be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.
(These matters are discussed in the transcript and exhibits and in such standard texts as ROYCE, INTRODUCTION TO FISHERY SCIENCES, 1972, and VAN CLEVE AND JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC, 1963).

The Ninth Circuit also affirmed the District Court's ruling that eleven Washington statutes could not be applied to treaty Indian fishermen. These statutes require good conservation practices, and now are only enforceable against all other citizens of the state. For example, one of these statutes, RCW 77.16.060 makes it unlawful to put poison or dynamite in the waters of the state with intent to kill game fish. Poison or dynamite could badly

damage or destroy a run of fish. The Ninth Circuit and District Court consider placing poison or dynamite in the waters of western Washington to be a treaty protected right so long as some fish escape.

B. TO STOP ABUSES OF POWER BY THE NINTH CIRCUIT AND DISTRICT COURT.

Federal courts have great power to remedy wrongs. But there are limits which have been exceeded in this case.

Possibly the Ninth Circuit and the District Court were led into error by sympathy. For 119 years these treaty Indians did not have the fishing opportunities promised them, as these treaties have now been interpreted. But there are also rights of other American and Canadian fishermen which were ignored.

1. THE DECISION OF THE NINTH CIRCUIT IN AFFIRMING A COMPLEX FISH ALLOCATION FORMULA AS A MATTER OF EQUITABLE DISCRETION IS IGNORING THE RIGHTS OF OTHER PEOPLE, CONTRARY TO THE DECISIONS OF THIS COURT IN PUYALLUP II AND MINNESOTA STATE SENATE v. BEENS, 406 US 187, 92 S Ct 1477, 32 L Ed 2d 1 (1972).

The treaties reserved to the tribes the right to fish "in common with all citizens of the territory." One of the treaties also reserves "the right in common with citizens of the United States to travel upon all public highways." (Treaty with the Yakimas, 12 Stat 951). In this case the District Court chose to quantify the right to fish. There is no evidence that the meaning of the words "in common" were discussed during treaty negotiations. The District Court cited no authority for the meaning of these words other than Webster's Dictionary, 1828 and 1862 editions, which define "common" as:

> "Belonging equally to more than one, or to many indefinitely....belonging to the public; having no separate owner ....general; serving for the use of all."

The District Court ignored the clear contemporaneous meaning of "in common" in connection with common use of public highways. It defined to fish "in common" to mean not a common use but a specific allocation. It held that the treaty tribes may catch:

1. All the fish they can catch on reservations (reservations are typically at the mouths of rivers); plus

2. All the fish they can eat; plus

3. All the fish they can use for ceremonies; plus

4. Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations." (Some of these are described quite broadly in the Decision, such as, "marine areas of

Northern Puget Sound from the Fraser River south to the present environs of Seattle" for the Lummi, or ten rivers and their tributaries for the Yakimas, whose reservation is across the Cascade Mountains in Eastern Washington); plus

5. All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

6. All the fish they can catch with commercial gear anywhere in Washington away from "usual and accustomed grounds and stations;" plus

7. Extra fish to replace the fish that do not reach the "usual and accustomed grounds and stations" (e.g., "Northern Puget Sound" for the Lummi Tribe) because they are caught by the Japanese or Russian fishing fleets which operate just outside United States territorial waters, or by Canadian fishermen, or by fishermen from

Alaska or Oregon.

The District Court argues for this seven element allocation formula by citing the canon that treaties are to be construed liberally in favor of the Indian tribes. Actually, it is impossible to defend this formula, or any other formula, as a matter of legal construction of treaty language.

The Ninth Circuit completely changes the basis for the allocation formula by making one modification, and then saying that this is a matter of sustaining the equitable discretion of the District Court. But an erroneous legal interpretation of language cannot be sustained with the cloak of equitable discretion. If the issue of treaty interpretation is legal rather than equitable, the Ninth Circuit should not switch to its views of the equities. Atlas Life Insurance Co. v. Southern Railroad, 306 US 563, 598 S Ct 657, 83 L Ed 987 (1939);

Hillsboro Township v. Cromwell, 326 US 620, 66 S Ct 445, 90 L Ed 358 (1945).

The error of the Ninth Circuit is that any sustaining of a fish allocation formula as a matter of equity forgets that the District Court was not attempting to balance equities. The District Court thought it was construing treaty language.

In Puyallup II this Court gave guidance for allocating the steelhead run on the Puyallup River with the identical treaty:

> "What formula should be employed is not for us to propose. There are many variables -- the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." (Emphasis supplied) (38 L Ed 2d 254, at 258)

The District Court to the contrary said:

> "However, off reservation fishing by other citizens and residents of the state is not a right but merely a privilege which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require." (384 F Supp 312, at 332)

There are limits even to the sins that may be committed in the name of "equitable discretion." When a District Court reached an unreasonable result in a reapportionment problem, this Court recently reaffirmed that "The remedial powers of an equity court must be adequate to the task, but they are not unlimited," Minnesota State Senate v. Beens, supra, 406 US 187,at 199 (1972).

This Court has been especially reluctant to allow the use of the federal court's equity powers to interfere with federal state relations, Schlesinger v. Councilman, _____ US ____, 95 S Ct 1300, 43 L Ed 2d

591 (1975): Burford v. Sun Oil Co., 319 US 315, 63 S Ct 1098, 87 L Ed 1424 (1943); Alabama Public Service Commission v. Southern Railroad Co., 341 US 341, 71 S Ct 762, 95 L Ed 1002 (1951).

The result of the Ninth Circuit decision is to ignore the fishing "rights of other people." When rights are ignored, there is no equity.

2. THE DECISION OF THE NINTH CIRCUIT SANCTIONS THE DISTRICT COURT INTERFERING WITH THE INTERNATIONAL RELATIONS OF THE UNITED STATES BY ISSUING INJUNCTIONS AGAINST THE STATE OF WASHINGTON REQUIRING IT TO DISOBEY ORDERS OF THE INTERNATIONAL PACIFIC SALMON FISHERIES COMMISSION OVER THE PROTESTS OF THE GOVERNMENT OF CANADA.

The International Pacific Salmon Fisheries Commission (hereinafter "IPSFC"), an international body established by treaty in 1937 between the United States and Canada, regulates the harvest of sockeye and pink salmon returning to the Fraser River system in Canada. The runs have been vastly increased

due to the efforts of IPSFC.

The District Court in its opinion recognized that "treaty right fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission." (384 F Supp 312, at 411). The District Court then ordered an "equitable adjustment" to the tribes for fish destined for "usual and accustomed grounds and stations" for fish caught by Canadian, Japanese, and Russian fishermen. This was the only part of the District Court order modified by the Ninth Circuit which said:

> "We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast."

The Ninth Circuit then added:

> "The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by

> other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas."

Instead, the District Court proceeded to order the state of Washington to disobey the orders of the IPSFC. On July 16, 1975, the District Court ordered Washington to establish a treaty Indian fishery in the Straights of Juan de Fuca that was more extensive both by time and gear than allowed by the IPSFC. The court then stayed most of the order "pending the conclusions of discussions between representatives of the United States and Canada now scheduled for Friday, July 18, 1975."

On July 18, 1975, a meeting was held between the United States and Canada to consider changing the IPSFC regulations to allow the additional special fishery for United States treaty Indians ordered by the District Court. An official of the

United States State Department headed the United States delegation. An agreement was not reached bewteen the two nations, and the United States State Department told Canada that it could not obey the regulations of IPSFC because of the order of the District Court. Further American state and federal court proceedings followed which are discussed in Section C below. On July 25, 1975, the IPSFC through its Chairman, W. R. Houston of the Department of the Environment, of Vancouver, British Columbia, protested to Dr. Henry Kissinger, United States Secretary of State.

On July 30, 1975, the District Court vacated the stay and put into effect the portion of the injunction preventing the state from interfering with the treaty Indians fishing with gear forbidden by the IPSFC. On August 8, 1975, the District Court enjoined the state from interfering

with the Swinomish Tribe seven day a week fishery in IPSFC waters which violated the time limitations imposed by the IPSFC. On August 15, 1975, the government of Canada in Ottawa informed the government of the United States of its objections to the unilateral actions of the United States in response to the District Court orders. The statement said "Canada considers this action to be contrary to the provisions of a bilateral convention." (These facts are all set forth in the material submitted to the Ninth Circuit in support of the Motion to Stay.)

Fortunately the IPSFC fishery ended on September 28, 1975. Millions more pink and sockeye salmon will be coming into IPSFC waters in 1976 and the matter remains unresolved.

C. TO RESOLVE CONFLICTS BETWEEN THE COURTS OF THE STATE OF WASHINGTON AND THE COURTS OF THE UNITED STATES.

The decisions of the Ninth Circuit and District Court conflict with decisions of the Supreme Court of Washington, and of the superior courts of Pierce and Thurston counties of Washington. These conflicts need to be resolved by this Court both as a matter of substantive law and for the proper inter-relationship of state and federal courts in the federal system.

1. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THE WASHINGTON SUPERIOR COURT DECISION ON REMAND FROM THIS COURT IN PUYALLUP II, AND MAY CONFLICT WITH THE APPEAL FROM THAT DECISION WHICH HAS BEEN ARGUED BUT NOT YET DECIDED BY THE SUPREME COURT OF WASHINGTON.

In Puyallup II, this Court instructed the state courts of Washington to determine whether hatchery fish which are paid for with the license fees and tags of sports fishermen are included within the treaty fishery,

and to develop a pattern of state regulation and allocation for the steelhead runs on the Puyallup River which balances the rights of Puyallup Tribe, Inc. with the rights of other people. These issues have been decided by the Superior Court of Pierce County, Washington, after a ten day trial. The Opinion, Findings of Fact, Conclusions of Law, and Decree are in the Appendix. The appeal from that decision was argued before the Supreme Court of Washington on September 15, 1975, after the granting of a Motion to Expedite, but no decision has been rendered as of the date of the writing of this petition. The decision will be forwarded to this Court as soon as it is available. Since the losing party, in the Washington Supreme Court, whichever it is, will undoubtedly petition for certiorari, this Court will then have the opportunity of granting certiorari in both cases

and having them argued together.

In the meantime, the Superior Court decision is the law of that case. The Superior Court in Puyallup III (the remand case) is in diametric opposition to the Ninth Circuit on a different record which involves the same Treaty and many of the same parties. The state court:

1. Defines conservation as wise use rather than only indispensability to optimum spawning.

2. Finds that the Puyallup Tribe fishery,if unregulated by the state,constitutes a threat to conservation.

3. Excludes the hatchery run from the Treaty.

4. Orders that the hatchery run is entitled to safe passage through the Puyallup reservation.

5. Finds,after an examination of the Treaty negotiation materials,that the words

"in common" were not intended to create a "division of ownership of fish."

Thus at the present time the hatchery run of steelhead on the Puyallup River is excluded from the treaty fishery by state court order but the hatchery run of steelhead on other western Washington rivers is included in the treaty fishery by federal court order. On the Puyallup River the hatchery steelhead cannot be caught on the reservation, while on other western Washington rivers where there is a reservation at the mouth of the river, a trap could be built across the river in the reservation catching all of the fish.

2. THE DECISION OF THE NINTH CIRCUIT SANCTIONS DISTRICT COURT INJUNCTIONS WHICH LEAVE THE OFFICIALS OF WASHINGTON STATE IN VIOLATION OF EITHER STATE OR FEDERAL COURT INJUNCTIONS ON THE SAME SUBJECT.

In 1974, the Washington Department of Fisheries reduced the salmon fishing season

for gill netters and purse seiners in the Puget Sound Marine fishery. These two commercial fishing groups were denied intervention in this case by the District Court. They then went to the only forum open to them, the Superior Court of Thurston County, and obtained an injunction against the Washington Department of Fisheries on the grounds of irreparable harm to their livelihood. This state court injunction was enjoined by the District Court without granting a hearing to the affected commercial fishermen.

Once again in 1975 a conflict arose between state and federal courts. On July 23, 1975, after the District Court had ordered the Department of Fisheries to disobey the orders of IPSFC, as set forth in Section B above, the purse seiners and gill netters went into the Superior Court of Thurston County and obtained an

injunction requiring the Department of Fisheries to obey the orders of IPSFC as required by RCW 75.40.060.

On August 6, 1975, the District Court upon oral motion of the United States without notice to the State of Washington Superior Court, enjoined the Superior Court injunction of July 23, 1975 as amended on August 1, 1975, and denied certification of the court's order for expedited appeal. The state of Washington cited cases such as Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 US 281, 90 S Ct 1739, 26 L Ed 2d 234 (1970), which limit federal injunctions against state court injunctions, but on August 20, 1975, the Ninth Circuit denied a stay of the District Court order.

The Superior Court case proceeded to judgment on September 19, 1975. That same

day the Department of Fisheries appealed to the Supreme Court of Washington and asked for a stay of the Superior Court judgment. The motion for stay of judgment was argued before the Supreme Court of Washington en banc on September 22, 1975. On September 23, 1975, the Supreme Court of Washington denied a stay of the Superior Court order. All of these orders are in the Appendix.

The Director of the Washington Department of Fisheries is now under injunction by the District Court which the Ninth Circuit refused to stay to disobey the directives of the IPSFC issued pursuant to a 1937 Treaty between the United States and Canada. He is also under injunction by the Superior Court which the Supreme Court of Washington refused to stay to obey the directives of the IPSFC. No more direct conflict between state and federal courts could even be imagined.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 17, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-592

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED,

Petitioner,

v.

UNITED STATES OF AMERICA, QUINALT TRIBE OF INDIANS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Plaintiff,*	No. 158069
vs.	MEMORANDUM DECISION
PUYALLUP TRIBE, INC., *Defendant.*	

This case has been remanded to this court by the United States Supreme Court in order to have it determine the allocation between the Treaty Indians and others of the steelhead run in the Puyallup River. *Department of Game of the State of Washington vs. The Puyallup Tribe, et al.*, 414 U.S. 44, 38 L.ed. 2d 254, 94 S. Ct. 330 (referred to hereafter as Puyallup I).

That allocation is to be accomplished by fairly apportioning that run on this river between these parties.

The U. S. Supreme Court in that decision interpreted the Medicine Creek Treaty on page 5 as follows:

> "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.
>
> "We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a par-

> ticular stream that all fishing should be banned until the specie regains assurance of survival. The police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

That court thus reaffirmed its prior holding that the police power of the state is adequate to prevent extinction of the specie and that there is *no Treaty right* that gives these Indians a *federal right* to pursue the last living steelhead.

That decision of the majority appears to be clarified by a concurring opinion to the extent that the Treaty rights of these Indians extend *only to the natural run of the steelhead* and that Treaty Indian fishery *cannot* take so many steelhead that the natural run would suffer progressive depletion.

This opinion refers to off-reservation rights of these Treaty Indians. In a prior opinion, *The Puyallup Tribe* v. *Dept. of Game of Washington*, 391 U. S. 391, 20 L.ed. 689, 88 S.Ct. 1725, (Referred to hereafter as Puyallup II), the court did not reach the question as to whether or not this Puyallup Indian Reservation still existed. See footnote on page 691.

The trial court found it did not. Further comment on that issue will be made at a later point in this opinion. On the two prior occasions this case has been before the U. S. Supreme Court an interpretation of the Medicine Creek Treaty has been made by that court.

The construction of that Treaty in the case of *Puyallup Tribe* v. *Department of Game of the State of Washington, supra,* (May, 1968, Puyallup I) was as follows:

1. The "right" to fish *outside* of the reservation cannot be qualified by the State of Washington.

2. The Treaty "right" was to fish "at all usual and accustomed grounds and stations."

3. The Treaty "right" is not an exclusive one. It is one "in common with all citizens of the Territory."

4. The Treaty did not specify the manner in which the fishing may be done. This *silence* indicated that the State of Washington can regulate the manner of fishing, the size of the take, the size of the commercial take, and the like, for conservation purposes, providing the regulations meet appropriate standards and do not discriminate against these Indians.

5. The overriding police power of the State, expressed in non-discriminatory measures for conserving fish resources is preserved.

In the second case the U. S. Supreme Court further construed this Treaty. It held *again* in that case (*Dept. of Game* v. *Puyallup Tribe, Inc., supra,* (Puyallup II):

1. That the Treaty gave to these Indians the right to fish for steelhead commercially and with nets.

2. That the police power of the State has the authority to regulate the manner of fishing, the the size of the take, the restriction of commercial fishing, and the like, so long as the regulation is in the interest of conservation and the regulations do not discriminate against the Indians.

3. That the aim of the court was to accommodate the rights of the Indians under the Treaty and the rights of other people.

4. The Treaty rights of the Indians can be controlled by the need to preserve a species.

5. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeons.

6. The Treaty does not give the Indians a federal rght to pursue the last living steelhead until it enters their nets.

In that opinion three judges concurred. They further observed that this opinion meant:

1. That the Treaty did not obligate the state to subsidize the Indian fishery with planted fish paid for by sports fishermen.

2. The Treaty rights extend only to the natural run of steelhead.

3. The Treaty Indian fishery cannot take so many fish that the natural run would suffer progressive depletion.

4. That commercial fishing by these Indians cannot be totally forbidden in order to permit sports fishing in the usual volume. However commercial fishing may be restricted in the interests of conservation.

Both opinions agree that the issue for resolution is the problem of accommodating commercial fishing by the Puyallups with conservation needs of the river and the rights of other people.

The word "conservation" was not defined in either of these decisions. That definition appears to be of paramount importance. In the original case that term was defined as follows, and I quote from the definition of J. E. Lasater, Associate Director of Operations, Department of Fisheries:

> "A. Very simply, it is wise use. When we put it in terms of salmon harvest, I would put it in three categories or three parts, by harvest, in management of salmon as a crop, *one*, there must be a surplus and over and above the needed spawning escapement to have an available crop and not be taking the feed stock. *Two*, the manner of fishing, itself, must be such that you can control it so that you do not dip into the seed stock. . . . *The other* thing is that the manner of fishing, itself, must not be destructive."

That definition was agreed to by all parties in this present trial.

Mr. Heckman, an expert witness for the defendant agreed to this definition but added only that there must be a maintenance of the habitat of the specie.

I mention this aspect because it does bear on the extent of the regulatory authority of the state.

It is one thing to regulate for conservation with

the purpose of preventing extinction of a specie, and quite another thing to regulate for the overall conservation program of the State of Washington. That program is designed to preserve and increase the production of salmon and steelheads for all user groups in all waters of the State of Washington. It is my opinion that all parties agree this is the program of the State of Washington in regard to all anadromous fish.

Accordingly I adopt that definition of the word "conservation" and interpret these two United States Supreme Court decisions to hold that the State of Washington has authority, for these conservation purposes, to regulate all persons in the manner in which they take fish and the amount of that take. These regulations must equally affect Treaty Indians when they fish off their reservation and must not discriminate against Indian fishery. Conservation in this regard is as helpful to the Treaty Indians as it is to all others. The fish are conserved, extinction is prevented and production increased and assured.

In order to apportion the steelhead in this circumstance it is necessary to again refer to the Treaty of Medicine Creek itself to determine and define a certain phrase.

The Treaty contains language in Art. 4, §3, as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations is further se-

> cured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the curing, together with the privilege of hunting, gathering roots and berries, and pasturing horses on open and unclaimed lands:
>
> "Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens, and they shall alter all stallions not intended for breeding horses, and shall keep up and confine the later."

The phrase "in common with all citizens of the Territory " has not been specifically judicially defined.

There have been various judicial references to that phrase, however. *Kennedy* v. *Becker*, 241 U.S. 556, 60 L.ed. 1167, decided in 1916, involved the interpretation of the Seneca Indian Treaty of 1797. It reserved to the Indians the privilege of fishing and hunting on lands located in the State of New York.

The question involved the prosecution of three Seneca Indians for spearing fish off the Seneca Reservation in violation of the statutes of the State of New York.

The pertinent language of that opinion is set out as follows:

> "The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the

Indians of this tribe. And, with respect to this non-exclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the state of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdicition of the state.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state (Geer v. Connecticut, 161 U.S. 519, 40 L.ed. 793, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U.S. 504, 507, 41 L.ed. 244, 245, 16 Sup. Ct. Rep. 1076), subject, of course, to any valid evercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, [563] go to the extent of insisting that the effect of the

reservation was to maintain in the tribe sovereignty *quoad hoc.* As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' We are unable to take this view. It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both.

"It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful, — when the cultivation contemplated by the whites was not expected to interfere with its abundance, — it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the soverignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an

> attempt either to reserve soverign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with [564] grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U.S. 371, 384, 49 L.ed. 1089, 1093, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 [12 Stat. at L. 951], said (referring to the authority of the state of Washington): 'Nor does it' (that is, the right of " 'taking fish at all usual and accustomed places' ") 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.' "

This case held specifically that this clause was a reservation of a privilege of fishing and hunting on off-reservation lands in common with all others *subject to* the necessary power of appropriate regulation as to *all those* privileged to so fish and hunt. This power was inherent in the sovereignty of the State over the lands where the privilege was exercised.

This case cites as authority for that proposition *United States v. Winans*, 49 L.ed. 1089.

In *Kennedy, supra*, the use of the words "in common with" meant, in my opinion, that the Seneca Indians by reason of their Treaty could hunt and fish as any other person and in the same manner as any other persons, but that they had no greater right to, nor any right to be regulated differently from all others.

At that early date, 1917, the U. S. Supreme Court did establish a State's right to conserve its fish resources for the use of all who had a right or privilege to fish within its boundaries.

In the case of *The Puyallup Tribe* v. *Dept. of Game, supra*, (Puyallup I), at page 693, the U. S. Supreme Court reaffirmed that position when it held:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States."

The language in this opinion clearly, specifically and positively interprets the Medicine Creek Treaty

to mean that the Treaty rights of these Indians to fish *off reservation* are *not exclusive.* They are to be exercised in common with *all* citizens of the Territory.

The rights of the citizens of the Territory can be regulated and so can the Indians.

In my opinion the only logical conclusion from this language is that fishing off reservation by non-Treaty Indians is to be shared with all the citizens just as though the Indians were citizens.

The phrase "in common with" is, again, in my opinion, a very simple, easily understood and comprehensive term.

The word "common" by definition means "of or relating to a community at large (as a family unit, social group, tribe, political organization or alliance) generally shared or participated in by individuals of a community: not limited to one person or special group."

I have in my personal law library a volume printed in 1973 entitled, "A New Abridgement of the Law." Its author was Matthew Bacon of the Middle Temple, Esq. On page 385 of that volume he defines the general law of "Common" and thereafter treats it in its various applications to page 394.

It is apparent from this ancient work that the law regarding "common" developed when many persons used another's property for pasturage of their

animals. No one had any individual right greater than another's; common of piscary, the right of taking fish in another's fish pond, pool or river is specifically referred to on page 384.

Also see "An American Dictionary of the English Language," by Noah Webster dated 1828.

That definition has as its clear thrust and impact that a right in common belongs to no one man but belongs equally to more than one, or to many indefinitely, as: life and sense are common to man and beast, or: the common privileges of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner.

Copies of that work are attached to this opinion.

The derivation of the word "common" convinces me this is the proper definition.

I have read all the available material concerning the background leading up to the explanation of this proposed treaty by Governor Stevens and its eventual signature by all concerned. They are exhibits in this case. I insisted that I read the original records myself rather than rely on an interpretation of someone else.

Exhibit 74-31 is the "Record of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country."

That document establishes that the Treaty was

read section by section to the Indians by the interpreter. There was no objection.

On page 8 of these records kept by James Doty the following reason was given for the formulation of Article III to the time of the meeting held with the Indians:

> "It was also thought necessary to allow them to fish at all accustomed places, since this would not in any way interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence."

This was Doty's explanation as to why this provision was placed in the Treaty. I have yet to see any reference to this document or this explanation any place in any analysis of the meaning of this phrase. But it clearly establishes in my mind that this was the explanation made to these Indians of Art. III of the Treaty. No reference is made to any different or greater rights on any reservation that might thereafter be established.

In these preliminary drafts of the proposed Treaty provision, Art. III was differently stated. It was designated Art. II and stated:

> "Art. II. There is however reserved to the use of said tribes the following tracts, viz.:
>
> "The right of fishing at common and accustomed places is further secured to them; Proviso against states or claims.
>
> "May be removed from one reservation to another on payment for improvements and cost of removal."

At that time the phrase "in common with citizens of the Territory" was not included. The inclusion in the Treaty itself in Art. III, coupled with the explanation by James Doty, clearly convinces me that this Treaty was to grant the Indians the same rights of every citizen to fish outside of the reservation, nothing more but nothing less. Since the Indians were not citizens it seems apparent that was the plain intent of the article.

Governor Stevens in his address to this group advised them that the whites were coming, some to build mills, some to make farms and some to fish. He advised them it was the Great Father's wish that the Indians have homes, pasture for their horses and fishing places. The Great Father wanted them to learn to farm and the children to go to school.

The purport of the Treaty as explained and agreed to expressed the desire of the United States to alter tribal life to the extent they should become farmers and their children should attend schools. *All* plans were to integrate them into a pattern of life different than they had followed for generations. Those plans were satisfactory to these Indians.

This was fully explained to them by Governor Stevens on December 25, 1854 through interpreters. On the next day it was again explained to them by Governor Stevens through an interpreter.

Thus, the Treaty was read section by section and explained to the Indians by an interpreter and every

opportunity was given them to discuss it. The Indians did discuss it and then they signed it. I am satisfied from the evidence that the Indians understood when they were told that they would be placed on reservations and would also be surrendering their claims to the rest of the land. In my opinion the remarks of Governor Stevens contained relatively simple concepts readily understood by these Indians who had been in contact for some years with the whites, both socially and commercially. All of the evidence supports this opinion.

Common ownership and common use of property were recognized and accepted aspects of Indian culture.

I am, therefore, convinced that this phrase in this Treaty, "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory," gave the *right* to these Indians to fish to the same extent as any other citizen of the Territory and that there was no division of ownership of fish in any fashion granted. I reach this conclusion from the decisions already cited and the plain meaning of the term.

The defendants have urged this court to accept the definition of this phrase formulated by Judge George H. Boldt in the case of *United States of America vs. The Puyallup Tribe, et al.* See Exh. 74-B.

In that decision, at page 38, the phrase "in common with" is defined as follows:

> "By dictionary definition and as intended and used in the Indian Treaty and in this decision 'in common with' means *sharing equally* the opportunity to take fish[29] at 'usual and accustomed grounds and stations'; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above."

I must respectfully disagree with that definition.

On page 30 of that opinion Judge Boldt refers to the philosophy of Congress referred to in the evidence submitted in the case he heard. He there states:

> "... this case presents an appropriate opportunity to take a step toward applying congressional philosophy to Indian Treaty right fishing in a way that will not be inconsistent with *Puyallup-I* and *Puyallup II* and also will provide ample security for interest and purpose of conservation."

The applicable principle for construing Indian Treaty language has been stated by the United States Supreme Court as follows:

Judicial authority to interpret Treaties:

> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were under-

> stood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.ed. 1115, 62 S.Ct. 862 (1942). But see *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L.ed. 1166, 36 S.Ct. 705 (1916)."

In view of this principle of judicial interpretation it is my opinion his position has granted rights to all of these Treaty Indians contrary to those established by former decisions of the United States Supreme Court in regard to off-reservation fishing rights.

He has interpreted this phrase to mean that all of these Treaty Indians have a *prior* right to take 50% of the harvestable fish and that this right is one that is to be exercised prior to any fishery in off-reservation waters by other citizens of the Territory. (State) That this is an exclusive right to be exercised by these Treaty Indians.

In my opinion this interpretation is directly contrary to the ruling in *Dept. of Game v. The Puyallup Tribe, et al.* (Puyallup II), *supra* which has clearly stated at page 693:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' "

Respective places here referred to "at all usual and accustomed places."

It must be clearly recognized that these Puyallup Indians have no claim to any reservation rights outside of a section of the Puyallup River.

I have made this comparison with Judge Boldt's decision for two reasons: One is that it was the position urged by the defendants. I felt the reason why I decided differently should be clearly stated.

The other reason is that the defendants apparently take the position that I was bound by Judge Boldt's decision.

It is my opinion Judge Boldt's decision is not controlling on the issue before me. The United States Supreme Court directed this court to allocate steelhead on the Puyallup River between Treaty and non-Treaty fishermen.

It is my understanding of the law that since these parties are before this court that problem is to be resolved by this court. In this circumstance no other court has jurisdiction of this subject matter at this time.

Thus the order of this court in this lawsuit will extend to the Treaty rights of the Puyallup Indians on the Puyallup River in regard to fishing for steelhead.

RESERVATION STATUS

The trial court in the original action made the following Findings of Fact:

"XII

"All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the 'Puyallup Tribe.' The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.

"XIII

"That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

"XIV

"The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

"XV

"The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement

Bay in the manner in which their fishing activities have taken place since 1953.

"XVI

"That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

"XVII

"That once anadromous fish runs in a river system have been destroyed, it is generally impossible to re-establish them.

"XVIII

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants."

From the Findings of Fact the court made the following Conclusions of Law:

* * * * *

"II

". . . That the Puyallup Indian Reservation no longer exists and that the state has assumed total and complete jurisdiction over all lands situated within its boundaries.

"III

"That the anadromous fish conservation program of the State of Washington, as it affects the Puyallup River watershed and Commencement Bay, is an integral and necessary part of an overall state conservation and preservation program for anadromous fish.

"IV

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

"V

"That to permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

I set those forth because they are still the law of this case in regard to those issues that have not been reversed by an appellate court.

So far as this case is concerned the Finding that the Puyallup Indian Reservation no longer exists has not been reversed. The United States Supreme Court did not reach a decision on that issue. I believe it is still for that body to determine, based on the evidence presented at the original trial of this matter.

Those Findings also determine that these defend-

ants were fishing the Puyallup River to the extent that the anadromous fish runs of the Puyallup River were unable to maintain themselves in an abundant supply without supplemental plantings by the State of Washington. In other words that fishery was depleting the natural run of steelhead.

These Findings also determine that the fishing activities of the defendants, if allowed to proceed unrestrained, could result in the destruction, or serious impairment of the anadromous fish runs of the Puyallup River. They aso determined that once this run is destroyed it is generally impossible to re-establish.

Those Findings of Fact have never been reversed.

The status of this case then is that these defendants were fishing this river in violation of the conservation policies of the State of Washington and were in the process of destroying the anadromous fish run of this river. I believe that the United States Supreme Court has recognized that fact. In my opinion, it was for this reason that the Court ruled the Treaty of Medicine Creek did not grant a *federal right* to these Indians to destroy or deplete this fish run, and that the State did have authority to prevent that destruction or depletion.

Each Indian Treaty must be separately considered, for the language is not the same in every Treaty, rendering the rights and obligations of the parties different. The case of *Mattz* v. *Arnett*, 412 U.S. 481, 37 L.ed. 2d 92, 93 S. Ct. 2245, established the proposition that the question of extinguishment of an Indian

Reservation depends upon the facts of each case and the intention of Congress.

I have read the case of *State of Washington* v. *Satiacum*, ★ . That case was decided by the Ninth Circuit Court of Appeals.

The United States Supreme Court has now declined to hear an appeal by the State of Washington in that case. This would indicate that the prior determination by Judge Cochran concerning the nonexistence of the Puyallup Indian Reservation will be reversed by the United States Supreme Court. I accordingly accept that position.

This does not, in my opinion, dispose of the question remaining for solution, namely, the allocation of steelhead between Treaty and non-Treaty parties on the Puyallup River in its entirety.

In *State* v. *Satiacum*, *supra*, the Ninth Circuit Court of Appeals stated simply the Puyallup Indian Reservation continued to exist. That holding was based on the case of *Mattz* v. *Arnett*, *supra*.

The *Mattz* case was a prosecution for violation of a state statute prohibiting the use of gill nets. It did establish that the Klamath River Indian Reservation was "Indian Country," within the meaning of 18 USC §1151. That entire section is devoted to the jurisdiction of states over "Indian Country."

At page 95 of that opinion the court stated:

> "We now reverse. The reversal, of course, does not dispose of the underlying forfeiture issues. On remand, the questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status will be addressed. We intimate no opinion on those issues."

It appears to me the question relating to the existence and extent of the fishing rights of the Puyallup Tribe within this reservation area is still a matter for determination by this court in regard to steelhead fishery.

This Treaty did not give these Indians the right to so conduct their fishery on their reservation property to the extent that it would damage or destroy the fish run that entered the Puyallup River.

These Indians now contend that since this reservation has been determined to still exist, they have the *sole right*, within the 7-mile area of the Puyallup River within the boundaries of their reservation, to fish as they desire and no one has any regulatory authority over them or the fish in this river. As a consequence, the fishing of the Puyallup Indians within that 7-mile area can be carried on in any manner they choose, and they can take all the fish they desire to the exclusion of all others. They also contend that they can take all of the harvestable fish that pass through that reservation area and that no other person has any right to any fish on the Puyallup River. This would give them complete control of, and ownership

of, all anadromous fish in the *entire Puyallup River system.* No one else could take any fish without endangering the survival of the species. This would practically make the Puyallup River system the fish farm for these Indians alone.

I do not believe this Treaty ever contemplated such a situation.

In the Treaty of Medicine Creek, these Indians were given the right to fish in common with all citizens of the Territory. That right to fish has been determined to be solely that since the Treaty did not provide otherwise. It was *silent* as to the manner of fishing, the size of the take and the restriction of commercial fishing.

It was *also silent* as to the amount of fish that could be taken. *It did not by its terms grant to these Indians all of the fish that entered the Puyallup River, nor any specific quantity of fish.* This Treaty did not give these Indians the right to fish in their usual and accustomed manner.

The Puyallup River was their ancestral home. The establishment of the Reservation by Executive Orders did not enlarge those Treaty rights. Both parties to this Treaty were aware that fish entering the Puyallup River went upstream to spawn and that their continued existence int his river was naturally dependent upon this situation.

Both parties were aware that the Reservation would not include the vast reaches of the Puyallup

River (See map of the Puyallup River, Exh. 74-1. ((The approximate boundaries of the former reservation are outlined in pink.))) All parties were aware that fishing on this river would be conducted by both Treaty and non-Treaty fishermen and that all parties fishing in this river should not jeopardize the natural fish run. It was for their mutual benefit to retain this important food source.

It only makes common sense that both parties understood the situation and that they both intended that neither would destroy or damage this marvelous natural bounty. It was not the intent of this Treaty that these Indians would have a right to all the fish that entered the Puyallup River. It was the intent of both parties that these Indians, and all others, were entitled to take a fair portion of the fish entering the Puyallup River going upstream to spawn.

Certainly if the non-Treaty parties were to take action which would prevent any migration into the Puyallup River, or to prevent fish from moving downstream through the old reservation area, these Indians would complain that this was a Treaty violation and, therefore, unlawful. These Indians would expect the courts to protect their Treaty rights. They would receive that protection.

These same Indians now take the position that they alone have the absolute right to destroy, or deplete, the fish in this river, and that they have no obligation to see that this run is maintained. They also

take the position that only Treaty Indians have any right to fish in the Puyallup River.

This is not the law in my opinion.

The question of conservation of fishery resources in its application to Indian reservations is a new one and has not been resolved at this time.

I am convinced that the United States Supreme Court will take the position that there is no federal right and thus no Treaty right by the Indians on this river to fish without some limitation. This limitation may be imposed either by a state court or by a Washington State regulation.

I am also convinced that the United States Supreme Court will hold that these Treaty Indians have only a right to fish for a fair portion of all fish passing through this reservation area consistent with the number of fish naturally propogated in this area.

In my opinion that is exactly what this Treaty meant, and the parties intended it to mean, when it was signed.

This interpretation does recognize the full obligation of this nation to protect the interests of a dependent people. It does conserve the natural fish run so that no one on this river can destroy or deplete it. Future generations of Puyallup Indians, and others, will be equally benefitted by this determination.

Otherwise these Indians today could take so much of the fish run that it would deplete it. From the Findings of Fact entered in this case that is exactly

what they were doing when this case was originally heard. Their action at that time was contrary to the long-term interests of future generations of the Puyallup Indians. It certainly appears apparent that these future generations need protection of this vital fish resource.

This is not a case in which a lake is completely surrounded by an Indian reservation, where no question of others' rights is involved.

It is for that reason, I believe, the United States Supreme Court in its prior decisions in this case stated that the Treaty rights of these Indians extended *only to the natural run and that fishermen on this river were to share that run with the Treaty Indians.*

Even though this area is determined to be still reservation property and these Indians thereby could deny access to others on this 7-mile area of the river, it is obvious there is a vast area where such fishing can be accomplished by non-Treaty fishermen. It appears that the placement of this reservation at the mouth of the Puyallup River was never intended by either party to grant to these Indians the Treaty right to catch all of the fish that entered the Puyallup River on their way to spawn upstream. If this was the intention it could very easily have been so provided in the Treaty or the Executive Orders that established this reservation.

It is obvious from the Treaty itself that no white man could enter the reservation without proper con-

sent. Within that reservation area these Indians had the exclusive right to fish in the Puyallup River. Fish caught there were theirs. But they did not convey to these Indians ownership of all the fish that entered the Puyallup River and were bound upstream to spawn through this area.

The upstream owners and the public also have certain rights and responsibilities. These non-Treaty parties have no right to monopolize these fish nor to damage the natural run in this river. They in turn have the right to catch a fair portion of the fish that enter this river. These rights, of course, are subject to control by the State of Washington.

See 47 ALR 2d 370, 35 Am. Jur.2d Fish and Game, §6 through §21, pages 630 through 664.

In my opinion it was the intent of both parties to this Treaty that these Indians would fish within the reservation exclusively, but that they would not take so many fish that they would deprive upstream owners of a fair portion of that fish run, and that both parties would conduct their own fishery so that the natural fish run would not be progressively depleted.

Whether the State of Washington has the right to regulate fishing in the reservation area does not appear controlling. This court has the authority to allocate and regulate Treaty fishery in this area. This case was brought to determine the extent of the Treaty rights of these Indians and thus the resolution

of that issue is within the issues presented to this court. The United States Supreme Court remanded this case to this court to make an allocation of the natural steelhead run between Treaty Indians and other fishermen.

The Supreme Court ruled that these Indian Treaty rights could be controlled by the need to conserve a specie. The trial court in the original trial of this matter specifically found that the fishing activity of these Indians was in the process of damaging the runs of anadromous fish and that the fish runs were in danger of extinction or depletion.

It certainly appears from the testimony of Ms. Bennett, Chairwoman and member of the legislative body of the Puyallup Tribal Council, that these Indians historically fished in a manner guaranteeing that fish would get back to their natural spawning areas. Thus, there was never any intent to destroy any steelhead run (St. 761). Ms. Bennett also testified that the Tribe's prior regulations were based on good judgment and common sense. (St. 762)

The regulations of the Tribal Council itself recognize the need for escapment (St. 768).

The present Tribal policy was stated by Ms. Bennett to be that "the Tribe does not plan to significantly nor disproportionately change prior patterns of steelhead harvests, and that the Puyallup River should continue to provide a favorable sports fishing stream in both its metropolitan settings and its more secluded rural reaches." (St. 770-771, Exh. Q)

It was her testimony also that this Tribe planned to take ninety to one hundred per cent of the steelhead run available for harvest because the steelhead all go through the Puyallup reservation. (St. 773)

This intention appears to me to be contrary to the prior rulings of the United States Supreme Court and the statement of Tribal policy.

These Indians plan independently to determine the size of the steelhead run and would allow such escapement as they determine to preserve the steelhead run. In this context they do not differentiate between naturally propogated and hatchery propogated steelhead. It is their position that these are all steelhead and their rights extend to all such fish regardless of origin.

This would then mean that no owner upstream, or the other citizens of the State of Washington, could fish for steelhead at all because any such fishing would deplete the remaining run of steelhead these Indians had allowed to escape.

Thus the State program, entirely financed by the sports fishermen of this State, would be entirely preempted by Treaty Indian fishery.

Ms. Bennett readily agreed that protection of the fish run was a necessity and that the Puyallup Tribe had their own conservation plan. She further agreed that the definition of the word "conservation" was that as set forth in pages 4 and 5 of this opinion.

It is apparent then that conservation is recognized

as a necessity by all parties. The real issue is who establishes the number of fish that can be caught and by whom.

I am of the opinion that the United States Supreme Court specifically recognized the obvious need to conserve the steelhead run on this river. Accordingly it stated.

> "The aim is to accomomdate the rights of Indians under the Treaty and the rights of other people."

It is my opinion that the court held that the Medicine Creek Treaty did not grant the federal right to these Indians to destroy the natural run of steelhead by progressive depletion. Accordingly, it is my understanding of these decisions that the Indians have no exclusive right to the fish in this river. They share in common that right and the fish that enter the river with non-Treaty parties.

The Indian right to commercially fish for steelhead with nets and the rights of other people to fish for steelhead with hook and line must be accommodated.

The rights of the Indians can be controlled by the State of Washington for proper conservation. This Treaty does not give these Indians a federal right to pursue the steelhead to extinction. Therefore the State can enforce reasonable restrictions on the commercial fishing of Indians even though the fish pass through a portion of the river that would be designated within the boundaries of an Indian Reservation. To interpret

that decision otherwise would be to allow these Indians the right they claim, that is, to fish in any way they choose and to take as many fish as they desire. This would give them the right within the reservation boundaries to destroy the steelhead run. This right is not given to them by their Treaty.

In regard to hatchery-propogated steelhead, these fish are in effect entitled to safe passage through any such reservation boundaries because these Indians have no Treaty rights to these fish. In other words they cannot fish with nets for these fish. They must fish for them as any other fisherman in accordance with State authorized equipment. They need not be licensed. These Indians cannot sell them commercially.

The only practical method of allocation is to determine what percentage of the steelhead run are naturally-propogated and what percentage are hatchery-propogated.

As to the percentage naturally propogated these are to be allocated. As to the allocation to these Treaty Indians, they can fish for those with nets and sell them commercially.

To accomplish this division it is necessary that the court establish that division and the number of fish to be taken by both parties.

ALLOCATION OF THE NATURAL STEELHEAD RUN

During this trial the only figures as to run size were offered by the State of Washington; it has the burden of establishing that fact.

These facts establish that of the actual steelhead caught and examined, 50% appeared to be of the naturally spawned variety and 50% appeared to be of the hatchery spawned variety.

The hatchery spawned variety were identified by a stubbed dorsal fin. Both parties agreed to the existence of this characteristic.

Additional facts further established that the smolt population that goes to sea are in equal numbers. The naturally propogated smolt are in the same number as the hatchery propogated steelhead. Thus an escapment, that is a return to spawn, would be 50% naturally propogated and 50% hatchery propogated.

The statistics in regard to run size are not precise. This is at best an imprecise operation. I took an average over a 10-year period from 1964 to 1973. Sportsmen caught a total of 118,663 steelhead in that period, an average of 11,866 fish per year. There were no Indian figures available. But during the 10-year period from 1954 to 1963 the total Indian catch reported was 27,140, an average Indian catch of 2,714 per year. The Department of Game felt these Indian catch figures were fairly accurate. In addition, the evidence disclosed that the steelhead run over the past

10 years has been fairly constant, although a decline has been noted in the past 2 years. Of course the State has continued to plant steelhead produced by its hatchery program.

In that regard I find that this hatchery program is financed entirely from funds received from sports fishermen for licenses and punch cards. No federal funds are spent on the program which involves the Puyallup River planting of steelhead raised in the South Tacoma Fish Hatchery.

In the 10-year period from 1954 to 1963 sports and Indian fishery caught a total of 145,811 steelhead, or an average of 14,581 per year. This 10-year period establishes that this river will support an average yearly run of combined natural and hatchery propogated steelhead of 29,162. That figure represents the total yearly average run of steelhead. That figure is arrived at by doubling the catch estimate to arrive at the total run in order to establish a catch and an escapement determination. One-half of that number must be allowed to escape to spawn so that that run size will not be depleted. That leaves one-half, or 14,581, subject to be caught or harvested.

In this connection, since there is an even return of natural and hatchery-reared steelhead, 7,290 are natural and 7,290 are hatchery-reared steelhead. So that of the 14,581 steelhead subject to harvest 7,290 are hatchery reared and the Indians have no Treaty right to net any of these fish nor to sell them commercially. This number is subject to hook and line

fishing only. Indians, of course, can fish for these, but only with regular gear, and not with nets, spears or any other method which differs from that allowed by the sports fishermen.

Of the remaining 50% that I have allocated to natural propogation, 7,290, the United States Supreme Court has directed allocation to be made between Treaty Indians and others.

In this connection, it must be kept in mind that, despite prior classification by the State of Washington of this steelhead as a game fish, these Indians have the right to net these steelhead and sell them commercially.

The Puyallup Indians numbered approximately *100* in 1854, at the time the Treaty was executed. (Finding of Fact IV). All of them lived from fishing.

At this time there are 20 regular Treaty Indian fishermen on this river. An additional 20 do parttime fishing. Some 20 more derive some support from these 40.

It certainly must be also kept in mind that earning a living from this activity is to be considered more important than fishing for recreation.

Accordingly, to allocate this natural run of steelhead between sports and Treaty fishermen, that factor has to be given considerable weight. I believe I must also recognize that these Indians are chiefly interested in the commercial catch and not in any sports fishing for steelhead. Another factor I considered was that the

hatchery planting program does increase the natural run. A hatchery propogated steelhead that returns to spawn, and does in fact spawn, contributes to the naturally propogated run.

In view of these factors, the number of Treaty Indians and sports fishermen involved, I would allocate 45% of those fish to the Treaty Indians, or a catch of 3,280. That would leave a catch of the natural run of 4,010 for the sports fishermen. The sports fishermen will also be fishing for steelhead in the hatchery propogated steelhead of 7,290.

I realize that no fish can be segregated prior to the time it is caught. But I believe since the return of steelhead is equally divided between natural and hatchery reared, it will work out so that each group will be catching half natural and half hatchery propogated fish.

To control this catch the defendant is to take a count of the steelhead caught and report it to this court to see that they stay within that limit. The fishing season of these Indians will be twice as long as it was last year, but in no event can they take over 3,280 steelhead.

The sports fishery will be of the same duration as last year and the State will take at least two (2) creel census to determine sports fishery on this take and they shall likewise stay within that limit.

The State of Washington Department of Game is to continue their planting of smolts in this river as it has in the past.

This allocation will continue until further order of this court. A yearly review of all catch figures will be made by this court because Indian net fishery for steelhead has been prohibited for years, and this will have to be monitored to make certain it will not deplete the run.

The fishing by defendants is to be carried on only by duly enrolled members of the Puyallup Tribe. That roll must be properly authenticated and filed with this court to determine the number and names of the fishermen so that only properly eligible fishermen, who in fact have these Treaty rights, are so fishing in this area. That roll must be filed with this court within thirty (30) days of the date of the Findings of Fact and Conclusions of Law are signed by this court.

I have read a great number of cases which I have not referred to in this opinion, nor attempted to point out distinguishing features. I hope to have those cases listed and available at the time the Findings of Fact are signed in this matter.

Dated at Tacoma, Washington, this 19th day of December, 1974.

/s/ *W. L. Brown, Jr.*
JUDGE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Plaintiff,* vs. PUYALLUP TRIBE, INC., *Defendant.*	No. 158069 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on regularly for trial commencing June 3, 1974, before the undersigned Judge of the above-entitled court pursuant to an amended petition for declaratory relief pursuant to the remand of the Supreme Court of the State of Washington in accordance with the United States Supreme Court decision in this matter, 414 U.S. 44, and the state Supreme Court decisions in 80 Wn.2d 561, 497 P.2d 171. This action was previously considered by the Washington State Supreme Court in 70 Wn.2d 245, 422 P.2d 754, and by the United States Supreme Court in 391 U.S. 392. The plaintiffs having been represented by the Honorable Slade Gorton, Attorney of the State of Washington, through Edward B. Mackie, Deputy Attorney General; the intervenor-plaintiff Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, being represented by Don S. Willner and Vincent R. Larson; the intervenor-plaintiff Western Steelheaders, Inc. being represented by James Tannesen; the defendant Puyallup Tribe represented by the Honorable Stan Pitkin, United States Attorney for the

Western District of Washington, Thomas P. Giere, Assistant United States Attorney, George D. Dysart, Assistant Regional Solicitor, United States Department of Interior, and William H. Rogers, Jr.; and Mr. John Sennhauser appearing for defendant Ramona Bennett, chairperson of the Puyallup Tribal Council; and the Court having reviewed the files and records herein insofar as material to the instant proceedings and having heard extensive evidence, examined exhibits and reviewed briefs and pleadings and arguments by counsel and having entered a memorandum decision on December 19, 1974, now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

This action was commenced by the Department of Fisheries and Department of Game of the State of Washington in November, 1963. The Honorable John D. Cochran, Judge, Pierce County Superior Court, on August 13, 1965, following the trial, entered Findings of Fact, portions of which read as follows:

"* * * * *

"XII

"All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently be-

ing utilized as a cemetery for members of the federal organization known as the 'Puyallup Tribe.' The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.

"XIII

"That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

"XIV

"The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

"XV

"The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

"XVI

"That the place, time and manner of fishing by the defendants was and is in violation of the

rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

"XVII

"That once anadromous fish runs in a river system have been destroyed, it is generally impossible to re-establish them.

"XVIII

"It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

"FROM THESE FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

* * * * * *

"II

"That the federal organization known as 'the Puyallup Tribe of Indians" was not signatory to the Treaty of Medicine Creek and that any blood line descendants of the aboriginal Puyallup Tribe who also may be members of the present day federal organization have no rights by virtue of said treaty. That the guardian-ward relationship between the United States Government and the defendants was severed when the lands comprising the Puyallup Indian Reservation were authorized to be sold in 1903. That the Puyallup Indian Reservation no longer exists

and that the state has assumed total and complete jurisdiction over all lands situated within its boundaries.

"III

"That the anadromous fish conservation program of the State of Washington, as it affects the Puyallup River watershed and Commencement Bay, is an integral and necessary part of an overall state conservation and preservation program for anadromous fish.

"IV

"It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants:

"V

"That to permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

* * * * * *

"Done in open court this thirteenth day of August, 1965.

"JOHN D. COCHRAN
Judge."

II.

Following the first Washington State Supreme

Court decision, 70 Wn.2d 245, 422 P.2d 754 (1967), and the first United States Supreme Court decision, 391 U.S. 392, this proceeding was remanded to the Pierce County Superior Court, and following a trial, the Honorable Bartlett Rummel, Judge, Pierce County Superior Court, entered Findings of Fact on December 30, 1970.

III.

The Washington State Department of Game is charged by law with the responsibility for the management and conservation of the steelhead resource in this state. Under Washington State law fishing for steelhead by non treaty parties is restricted to hook and line fishery, and the commercial sale of steelhead by these parties is prohibited. To manage and conserve this resource the Department has established a regulation for non-treaty fishermen that provides a limit of 30 steelhead per season per fisherman, 2 steelhead per day, and no more than 4 in possession at any given time. The Department has further established seasons which prohibit fishing at certain times and has closed specific areas to protect necessary spawning escapement for these fish. The Department has also promulgated reasonable regulations for the fishing by Treaty Indians for steelhead in the Puyallup River.

IV.

Steelhead fishermen are required to obtain an annual license ($7.50) and an annual steelhead punchcard ($2.00) with limited exceptions. Treaty Indians

fishing within their ceded areas are not required to pay a fee and obtain a license. There is no discrimination or exclusion from their participation in the hook and line fishery for steelhead. The hunting and fishing license fees collected by the Department of Game are placed in the state game fund and cannot be used for any purpose other than "the protection, propagation and restoration of wildlife and game and the expenses of administration of the department." These fees provide 75%-80% of the operating funds of the Department of Game.

V.

Steelhead which is an anadromous Rainbow trout, naturally spawn in fresh water streams and rivers, including the Puyallup River. The vast majority of naturally propagated steelhead, two years after having been spawned in fresh water, migrate to salt water. Little is known of the life cycle of steelhead while in saltwater. Only approximately 10% of the migrating steelhead smolts return as adult steelhead to the fresh water of their origin, and the majority do so after two years in saltwater. All but a small percentage of the returning steelhead die following the spawning process in fresh water.

VI.

A native or natural run of steelhead requires that approximately 50% of the steelhead entering the river be available for spawning in order to replenish and perpetuate the steelhead run in the watershed.

Thus in the Puyallup watershed the harvest or catch of native steelhead should not in the interest of conservation exceed 50% of the returning adult native steelhead.

VII.

A hook and line fishery for steelhead is relatively inefficient and thus the inefficiency of the fishery permits an adequate escapement of steelhead for spawning purposes which are necessary for conservation. The hook and line fishery does not require active daily management by a regulatory agency in order to conserve and protect the steelhead fishery.

VIII.

A net fishery in fresh water is an efficient means of harvesting steelhead and the efficiency of the fishing gear can result in the over-harvesting of steelhead, thus reducing the number of steelhead which are available for spawning purposes to less than that necessary for conservation. This fishery is subject to regulation by the Department of Game or this Court for the purposes of conservation and allocation.

IX.

The Department of Game has engaged for a number of years in a substantial hatchery program to enhance and increase the production of steelhead throughout the state of Washington. The hatchery program involves some 18 hatcheries and 9 rearing

ponds with a capital replacemeent value of $33,652,-241, and annual operational cost for the fiscal year July 1, 1972 to June 30, 1973) of $1,636,247. The Department of Game's program has an annual capacity of approximately 5,000,000 winter and summer run steelhead smolts per year. A smolt is a steelhead which has reached the stage of its development that it is ready to commence the migration to salt water and is normally 6-8" in length. The smolt are planted in rivers and streams throughout the state by this Department.

X.

The Department of Game commenced planting hatchery steelhead in the Puyallup River in 1933. All of the hatchery steelhead being planted in the Puyallup River are secured from a nearby state hatchery. The operation of this Department which supplies these steelhead is virtually entirely financed from funds received from the sale of licenses and punch cards to sports fishermen. Since 1963, the number of steelhead smolt planted in the Puyallup River has varied from a low of 57,000 to a high of 124,000, and in recent years the plants have been 75,000 and 68,000. The rate of return of adult steelhead from salt water to the fresh water of origin varies, but generally is approximately 10% of the native and hatchery smolts.

The hatchery smolts when planted by the Department in the Puyallup watershed are 6-8" in length, and their planting coincides with the natural out-

ward migration of steelhead smolts. The hatchery-planted smolts spend very little time in the fresh water, normally not exceeding one week in the watershed.

XI.

The physical characteristics of the adult native steelhead and the adult hatchery steelhead are virtually the same. The adult hatchery steelhead enter the Puyallup River on their upstream migration in larger numbers than do the native steelhead early in the fishing season (i.e., December, January). Conversely, the adult native steelhead compose a higher proportion of the total run that occurs during the months of February and March. The hatchery-reared steelhead are identifiable by dorsal fin damage and the growth rings on the fish scales. Creel censuses have been made to determine the percentage of hatchery steelhead in the Puyallup River for the 1962-1963, 1971-1972, and 1972-1973 fishing seasons. The percentage of hatchery adult steelhead to the total steelhead run has slight variations from year to year, but the censuses have established that slightly in excess of 50% of the recent steelhead runs in the Puyallup River consist of hatchery adult steelhead.

XII.

The annual adult steelhead run in the Puyallup River varies from year to year, but over a ten-year period, it has been relatively constant with the exception of a decline in the last two years. In the

period from 1954-1963 the combined sports and Indian fishery caught a total of 147,155 steelhead, or an average of 14,715 per year. Since the steelhead catch reflects 50% of the total run, this establishes that the Puyallup River will suport an average yearly run of combined natural and hatchery propagated steelhead of 29,430. For the ten-year period from 1964 through 1973, the sports and Indian fishery caught a total of 120,980 steelhead; however, the Indian catch statistics for that period are incomplete. On the basis of the 1954-63 steelhead run sizes which are slightly larger than the more current statistics, the average annual run of steelhead consists of 14,715 hatchery fish and 14,715 natural steelhead. It is necessary for conservation to have a 50% escapement of the natural adult steelhead run. Thus, the average is 7,357 harvestable natural adult steelhead in the Puyallup River on an annual basis. The annual planting of steelhead smolt by the Department of Game permits a full 100% harvest of the hatchery-reared steelhead since the planting substitutes what would otherwise be necessary for spawning purposes.

XIII.

At the negotiations at the Treaty of Medicine Creek, Governor Stevens, on behalf of the United States government, advised the Indians that white citizens would come to Western Washington to build mills, make homes and engage in fishing, and the government wanted the Indians to learn to farm and

have their children attend school, and the intention was to integrate the Indians into a pattern of life different from that they had followed in past generations, and that these plans were satisfactory to both parties.

XIV.

The purpose expressed by negotiators for the Treaty of Medicine Creek for the inclusion of the provision relating to Indian fishing rights in Article III was to allow the Indians to fish at all accustomed places since this would not interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence.

XV.

There are presently 20 fulltime Puyallup tribal treaty fishermen, 20 parttime fishermen, and an additional 20 who occasionally participate in the fishery. The Indian net fishery is for personal and commercial purposes and provides income for tribal members. The majority of this income is from salmon fishery. Income from steelhead fishery is very limited.

XVI.

This Court in the first trial of this matter concluded that the Puyallup Indian Reservation no longer exists. The United States Supreme Court, 391 U.S. 392, 395, note 1, specifically reserved ruling on that question. Subsequently, in *Satiacum v. Washington*,

414 U.S. 1, the United States Supreme Court vacated a judgment of the Washington State Supreme Court that the Puyallup Reservation had ceased to exist. More recently, the United States Court of Appeals for the Ninth Circuit in *United States v. State of Washington*, 496 F.2d 620 (cert. den. 47 L.ed.2d 307), decided that the Puyallup Indian Reservation had not been terminated and extinguished. It is assumed, therefore, that this Reservation has not been extinguished and still exists. The extent of this existence has not been judicially determined.

XVII.

The Puyallup Reservation includes approximately a 7-mile stretch of the Puyallup River commencing near the mouth of the river. There are a number of fishing areas on the Puyallup River and its tributaries which are upstream from the reservation area,

XVIII.

The Puyallup Tribe currently intends to concentrate its fishing for steelhead within the boundaries of the reservation and have indicated an intention to take 90% of their steelhead harvest within that area.

XIX.

During the 1973-74 steelhead fishing season of 121 days, a creel census was taken on 57 days, interviewing fishermen on the Puyallup River. On those days 3,243 persons were observed engaging in the

hook and line fishery on the Puyallup River. 5,171 persons engage in the hook and line fishery on the Puyallup River during an entire year.

XX.

The Department of Game promptly following the United States Supreme Court decision, 414 U.S. 44 (November 19, 1973) adopted regulations effective December 1, 1973, providing for gillnet fishing by Puyallup tribal members on the Puyallup River.

XXI.

The Department of Game in order to carry out its management responsibilities in the interest of conservation of the steelhead resource must know the numbers and names of Puyallup tribal fishermen so that only such eligible tribal fishermen will be permitted to fish for steelhead by means other than a hook and line fishery.

XXII.

A fair apportionment or allocation of the harvestable natural adult steelhead on the Puyallup River is to permit the Puyallup Treaty Indians to have 45% of the harvestable natural steelhead in the Puyallup River, or an annual catch of 3,310 provided that the annual runs continue to be in approximately the same magnitude as that reflected in Finding of Fact No. 12.

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CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and the subject matter in this proceeding.

II.

The Department of Game of the State of Washington has the authority to manage and regulate the steelhead resource of the State of Washington. The Game Department's program is designed to preserve and increase the production of steelhead.

III.

The Department of Game's and the State of Washington's regulation and management of the hook and line fishery for steelhead in the Puyallup River does not discriminate against Puyallup tribal members.

IV.

The Puyallup Tribe is a beneficiary of the Treaty of Medicine Creek, 10. Stat.1132, and its tribal members are entitled to treaty fishing rights at usual and accustomed areas, which include the Puyallup watershed. The treaty right to fish is in common with all the citizens of the territory and is not an exclusive right. The determination of the extent of this right within the boundary of the former Puyallup Indian reservation is not now before this court. The Treaty did provide that within these boundaries as originally described and established, these Indians were en-

titled to exclusive possession. However this exclusive right of possession did not convey to these Indians ownership of all fish that entered the Puyallup River and were bound upstream to spawn, or were bound downstream to migrate.

Both parties intended that each would have a fair portion of the fish in the river. Neither party had the right to monopolize these fish nor damage the natural run in this river. Both parties intended that they would conduct their own fishery so that the natural fish run would not be progressively depleted.

V.

The language "in common" in the Treaty of Medicine Creek means that no one has any individual rights greater than another's, a right in common belongs to no one man but belongs equally to more than one or to many indefenitely, as: life and sense are common to man and beast, or: the common privilege of citizens, the common wants of man. That is, a right in common belongs to the public; it has no separate owner .

VI.

The Indian treaty fishing rights do not extend to steelhead which are planted in the Puyallup River by the Department of Game under its hatchery program.

VII.

The state, through its Department of Game, or

this Court, has the authority to regulate the fishing activities of Puyallup tribal members when such regulations are necessary for the purposes of conservation.

VIII.

Conservation means the wise use of the resource and in the management of steelhead there must be necessary escapement for needed spawning to insure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so that it does not impair or damage the necessary spawning escapement and further, the manner of fishing itself must not be destructive.

IX.

The fishing activities of the defendant tribe and its members, if allowed to proceed unrestrained, could result in the destruction or serious impairment of the steelhead fish runs in the Puyallup River. Once a run is destroyed it is generally impossible to reestablish. Such depletion would damage future treaty fishing rights of future Puyallup Indians.

X.

The treaty does not create or reserve for the Indians any property interest in the resource but does permit tribal members to have a fair portion of the natural adult steelhead entering the Puyallup River. A fair portion of the natural steelhead run is 45% of the harvestable portion of the natural steelhead run in the Puyallup River in view of the number of

Indian fishermen, the purpose of their fishery, the number of sports fishermen, the catch limitations, the locations of the fishing areas and the availability of harvestable fish.

XI.

The treaty does not authorize the Puyallup Indians to conduct their fishery in such a manner as to damage or destroy the fishery or to pre-empt completely others from fishing in common upriver even by fishing activities which occur within the boundaries of the reservation. This court has jurisdiction to exercise limitations upon the reservation Indian fishery to the extent that it is necessary to protect the passage of fish to upstream fishing and spawning areas.

XII.

The Puyallup tribal members by virtue of the treaty can utilize fishing gear which is prohibited to other citizens of the state for steelhead fishing, but the use of such gear is subject to the regulatory authority of the State of Washington through the Department of Game in the interest of conservation.

DONE IN OPEN COURT this 8th day of April, 1975.

W. BROWN, JR.
Judge.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Plaintiff,*	)	No. 158069
vs.	)	ORDER AND JUDGMENT
PUYALLUP TRIBE, INC., *Defendant.*	)	

THIS MATTER came on regularly for trial commencing June 3, 1974, before the undersigned judge of the above-entitled court pursuant to an amended petition for declaratory relief pursuant to the remand of the Supreme Court of the State of Washington in accordance with the United States Supreme Court decision in this matter, 414 U.S. 44, and the state Supreme Court decision in 80 Wn. 2d 561, 497 P.2d 171. This action was previously considered by the Washington State Supreme Court in 70 Wn.2d 245, 422 P.2d 754, and by the United States Supreme Court in 391 U.S. 392. The plaintiffs were represented by the Honorable Slade Gorton, Attorney General of the State of Washington, through Edward B. Mackie, Deputy Atorney Genteral; the intervenor-plaintiff Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, were represented by Don S. Willner and Vincent R. Larson; the intervenor-plaintiff Western Steelheaders, Inc. were represented by James Tannesen; the defendant Puyallup Tribe was represented by the Honorable Stan Pitkin, United States Attorney for the Western District of Washing-

ton, Thomas P. Giere, Assistant United States Attorney, George D. Dysart, Assistant Regional Solicitor, United States Department of Interior, and William H. Rogers, Jr.; and Mr. John Sennhauser appeared for defendant Ramona Bennett, chairperson of the Puyallup Tribal Council; and the court having heard the evidence and arguments of counsel and being fully advised in the premises and having filed a memorandum opinion, and having entered its findings of fact and conclusions of law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the findings of fact and conclusions of law entered in this case upon this date are incorporated herein by reference as though fully set forth and are declared to govern the rights, status and other legal relationships between the parties.

That the Department of Game of the State of Washington has the authority to regulate the off-reservation fishing activities of the Puyallup tribal members when such regulations are necessary for the purposes of conservation.

That within the boundaries of the Puyallup Indian Reservation this Court has jurisdiction and authority to allocate fishery of both hatchery and naturally propogated steelhead between Treaty and Non-Treaty parties.

That duly enrolled members of the Puyallup Tribe are entitled to catch 45% of the harvestable natural

steelhead run in the Puyallup River each year, but this catch cannot exceed 3,280 steelhead in any one year; that these Indians are authorized to fish with nets of their own choosing and to sell their steelhead catch commercially;

That these Indians have no Treaty right to fish for hatchery propogated steelhead planted by the State of Washington, Department of Game, in the Puyallup River. That in reference to these steelhead these Indians must fish in the same manner as any other citizen of this state and must obey all state game regulations regarding the manner of fishing and the size of the catch. Provided these Indians need not be licensed by the State of Washington to fish for these steelhead.

That the defendant Puyallup Tribe shall file with the court within thirty days of this judgment a properly authenticated roll of Puyallup tribal members who are authorized to exercise treaty fishing rights in the Puyallup River watershed.

That the defendant Puyallup Tribe shall on a weekly basis during the steelhead fishing season report to the court and the plaintiff Department of Game the total number of steelhead caught by tribal members during that weekly period.

That the Department of Game of the State of Washington shall continue the planting of steelhead smolts in the Puyallup River.

That the court will retain continuing jurisdiction for the purposes of regulating, if necessary, the Indian

fishery within the boundaries of the Puyallup Reservation and further for making such adjustments as appear appropriate in the number of steelhead allocated for treaty fishermen.

DONE IN OPEN COURT this 8 day of April, 1975.

W. Brown
JUDGE

Superior Court Injunction (7/23/75)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

PURSE SEINE VESSEL OWNERS ASSOCIATION, a Washington non-profit corporation, RICHARD C. JOHNSON; PUGET SOUND GILLNETTERS ASSOCIATION, a Washington non-profit corporation, DAVID MILHOLLAND,

Plaintiffs,

vs.

DONALD MOOS, DIRECTOR, WASHINGTON STATE DEPARTMENT OF FISHERIES; STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Defendants.

No. 52881

PRELIMINARY INJUNCTION

THIS MATTER having come on regularly for hearing before the above entitled Court on July 23, 1975, upon the motion of the plaintiffs for a preliminary injunction, pending determination of this proceeding, requiring the defendants to suspend the regulations of the director of fisheries, known as order numbers 1218, 1226 and 1229, which authorize certain treaty Indian fishermen to fish with any gear authorized by the State of Washington in all waters (convention waters) under the jurisdiction of the International Pacific Salmon Fisheries Commission (IPSFC), except state area 2, when such waters are open to fishing by any United States fisherman, and which further authorize said treaty Indians to fish at least five fishing days per week in the state area 2, and further enjoining said defendants from adopting

any other regulation which are at variance with the Commission regulations, and the plaintiffs and defendants appearing by and through their respective counsel of record, and it appearing that proper notice of this hearing have either been given to or waived by all parties, and the court having considered the arguments of counsel and the affidavits on file herein and being fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants, Donald W. Moos, Director of the Washington State Department of Fisheries, and the State of Washington Department of Fisheries, and their employees and agents, are hereby ordered to suspend the director's above described regulations known as order numbers 1218, 1226 and 1229, and said parties are further enjoined from adopting any other regulations, which are at variance with the regulations of the International Pacific Salmon Fisheries Commission, pending a final determination of this proceeding and until further order of this court.

DONE IN OPEN COURT this 23rd day of July, 1975.

/s/ GERRY L. ALEXANDER
JUDGE

Presented by:

Of Counsel for Plaintiffs

Approved for Entry:

/s/ J. M. JOHNSON
Of Counsel for Defendants

Superior Court Findings (7/23/75)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

PURSE SEINE VESSEL OWNERS ASSOCIATION, a Washington non-profit corporation, RICHARD C. JOHNSON; PUGET SOUND GILLNETTERS ASSOCIATION, a Washington non-profit corporation, DAVID MILHOLLAND,

Plaintiffs,

vs.

DONALD MOOS, DIRECTOR, WASHINGTON STATE DEPARTMENT OF FISHERIES; STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Defendants.

No. 52881

FINDINGS ON PRELIMINARY INJUNCTION

THIS MATTER having come on regularly for hearing before the above entitled Court on July 23rd, 1975, upon the motion of the plaintiffs for a preliminary injunction, pending determination of this proceeding, requiring the defendants to suspend the regulations of the director of fisheries, known as order numbers 1218, 1226 and 1229, which authorize certain treaty Indian fishermen to fish with any gear authorized by the State of Washington in all waters (convention waters) under the jurisdiction of the International Pacific Salmon Fisheries Commission (IPSFC), except state area 2, when such waters are open to fishing by any United States fisherman, and which further authorize said treaty Indians to fish at least five fishing days per week in the state area 2, and further enjoining said defendants from adopting any other regulation which are at variance with the

Commission regulations, and the plaintiffs and defendants appearing by and through their respective counsel of record, and it appearing that proper notice of this hearing has been given to or waived by all parties, and the court having considered the arguments of counsel and the affidavits on file herein and being fully advised now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Based upon all of the files and records herein including the affidavits filed herein, the court finds:

I.

Unless the above described regulations of the director of fisheries known as order numbers 1218, 1226 and 1229 are suspended, certain fishing by treaty Indians will take place in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission which will result in immediate, certain and substantial irreparable injury and damage to the individual plaintiffs, members of plaintiff associations, and other Purse Seine and Gillnet fishermen similarly situated, and they have no plain, speedy and adequate remedy at law.

II.

Unless said defendants and their employees and agents are further enjoined from adopting any other regulations which are at variance with the regulations of the International Pacific Salmon Fisheries

Commission, said plaintiffs, members of plaintiff associations and other Purse Seine and Gillnet similarly situated will suffer immediate, certain and substantial irreparable injury and damage.

III.

The questions of law and fact to be ultimately determined in this cause are grave and difficult; however, on their face said regulations are beyond the director's authority to adopt.

IV.

Pending final determination of this proceeding and until further order of this court, a preliminary injunction should be issued against said defendants requiring them to suspend the above described regulations, and enjoining them from adopting any other regulations which are at variance with the regulations of the IPSFC.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following conclusions of law.

I.

Defendants, Donald W. Moos, director of the Washington State Department of Fisheries, and the State of Washington Department of Fisheries, and their employees and agents, pending final determination of this proceeding and until further order of this court, shall be required to suspend said director's regulations known as order

numbers 1218, 1226 and 1229, and shall be enjoined from adopting any other regulations which are at variance with the regulations of the International Pacific Salmon Fisheries Commission, and beyond the defendants' authority to adopt.

DONE IN OPEN COURT this 23rd day of July, 1975.

/s/ GERRY L. ALEXANDER
JUDGE

Presented by:

/s/ JOSEPH T. MIJICH
of Counsel for Plaintiff

Approved for Entry:

/s/ J. M. JOHNSON
Of Counsel for Defendants

Superior Court Amended
Preliminary Injunction
(8/1/75)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

PURSE SEINE VESSEL OWNERS ASSOCIATION, a Washington non- profit corporation; RICHARD C. JOHNSON; PUGET SOUND GILLNETTERS ASSOCIATION; a Washington non-profit corporation; and DAVID MILHOLLAND,
Plaintiffs,

vs.

DONALD W. MOOS, Director, Washington State Department of Fisheries; and STATE OF WASHINGTON, Department of Fisheries,
Defendants.

No. 52881

AMENDED PRELIMINARY INJUNCTION

THIS MATTER having come on regularly for hearing before the above entitled court on August 1, 1975, upon the motion of the plaintiffs for an amended preliminary injunction, pending determination of this proceeding, and the plaintiffs and defendants appearing by and through their respective counsel of record, and it appearing that proper notice of this hearing have either been given to or waived by all parties, and the Court having considered the arguments of counsel and the affidavits on file herein and being fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the preliminary injunction entered by this Court on July 23, 1975, is

Superior Court Amended
Preliminary Injunction
(8/1/75)

hereby amended by adding thereto the following provisions:

1. Defendants Donald W. Moos, Director of the Washington State Department of Fisheries, and the State of Washington Department of Fisheries, and their employees and agents, are hereby ordered to suspend the Director's regulation number 1234 which authorizes certain treaty Indians to fish with any type of lawful fishing gear continuously in all convention waters when such waters are open to fishing by any United States fishermen, pending a final determination of this proceeding and until further order of this Court.

2. Said defendants and their employees and agents are further enjoined from adopting any other regulations which are at variance with the regulations of the International Pacific Salmon Fisheries Commission, pending a final determination of this proceeding and until further order of this court.

3. All other provisions of the preliminary injunction heretofore entered on July 23, 1975, shall remain unchanged, and no additional bonds than are already on file herein shall be required for this amended preliminary injunction.

DONE IN OPEN COURT this 1st day of August, 1975.

/s/ GERRY L. ALEXANDER
JUDGE

Presented by:
/s/ JOSEPH T. MIJICH
One of the Attorneys for the Plaintiff

Approved for Entry and Notice of Presentation Waived: /s/ J. M. JOHNSON

Superior Court Findings
and Conclusions (9/19/75)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

PURSE SEINE VESSEL OWNERS ASSOCIATION, a Washington non-profit corporation; RICHARD C. JOHNSON; PUGET SOUND GILNETTERS ASSOCIATION, a Washington non-profit corporation; and DAVID MILHOLLAND,

Plaintiffs,

vs.

DONALD W. MOOS, DIRECTOR, WASHINGTON STATE DEPARTMENT OF FISHERIES; AND STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Defendants.

No. 52881

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on regularly for trial before the court on plaintiffs' action for a declaratory judgment and injunctive relief pursuant to RCW 34.04.070 and RCW 7.40.020, respectively, and the plaintiffs appearing through their respective attorneys, Joseph T. Mijich (representing PSVOA and Johnson) and Jacob A. Mikkelborg (representing PSGA and Milholland), and the defendants appearing through their attorneys, the State Attorney General, Slade Gordon, and James M. Johnson, Assistant Attorney General, and the Court having considered the testimony and other evidence admitted, including the Trial Stipulation and exhibits, and the Court having permitted plaintiffs to amend their pleadings to conform with the

Trial Stipulation and to allow a prayer for relief consistent with the scope of the issues to be resolved by the Court, and the Court having considered the memoranda and oral arguments of counsel, and being fully advised in the premises, now makes the following Findings of Fact, and, based thereon, the following Conclusions of Law, to-wit:

DEFINITION

The following definitions shall be applicable herein:

1. "Convention" means the Convention between the United States of America and Canada for the protection, preservation and extension of the sockeys salmon fishery of the Fraser River system, proclaimed August 4, 1937 (50 Stat.1355; Joint Exhibit (JE) 1), as amended by the pink salmon protocol entered into between said two countries and proclaimed by the President of the United States of America on July 24, 1957 (JE2).

2. "Commission" means the International Pacific Salmon Fisheries Commission (sometimes IPSFC) established pursuant to the Convention.

3. "Convention Waters" means those waters described in Sections 1, 2 and 3 of Article I of the Convention proclaimed on August 4, 1937.

4. "U. S. Convention Waters" or "Case Area" means those Convention waters of the Straits of Juan de Fuca and northern Puget Sound which are under the juris-

diction of the Commission but in which U.S. fishermen confine their fishing activities and Commission regulations are enforced by the United States or its agents.

FINDINGS OF FACT

I

Plaintiffs Purse Seine Vessel Owners Association (PSVOA) and Puget Sound Gillnetters Association (PSGA) are non-profit corporations, licensed and qualified to do business in the State of Washington. Plaintiffs Richard C. Johnson (Johnson), the President of PSVOA, and David Milholland (Milholland), the President of PSGA, are resident Washington State commercial net fishermen and fishing vessel owners directly regulated in their fishing business by the defendants, and intend to commercially fish with Purse Seine and Gill Net Gear, respectively, in the case area, as they have for many years past. Plaintiff non-profit corporations include in their membership the major elements of the United States Commercial Net Fishing Salmon Harvesting Industry in the case area. The plaintiffs have standing to bring this action.

II

Defendant Donald W. Moos (director) is the director of the defendant State of Washington Department of Fisheries (department), and said department is an agency of the State of Washington, and the director and the department function pursuant to the statutory provisions set forth in RCW Title 75. The duty and purpose of the department

is set forth in RCW 75.08.012 as follows:

> "It shall be the duty and purpose of the Department of Fisheries to preserve, protect, perpetuate and manage the food fish and shell fish in the waters of the State and the off-shore waters thereof to the end that such food fish and shell fish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof."

III.

On April 11, 1975, the United States approved regulations adopted by the Commission for commercial fishing for sockeys and pink salmon within convention waters in 1975 (JE 3). Said Commission regulations provided for open weekly fishing periods (initially almost three days -- 71 hours) and said open fishing periods were allocated among three types of fishing gear, reef nets, purse seines and gill nets. Said allocation, characterized as "gear limitations," initially provided for reef net fishing on Sunday, purse seine fishing during daylight hours on Monday and Tuesday (33 hours), and gill net fishing during night-time hours on Monday night, early Tuesday morning, Tuesday night and early Wednesday morning (33 hours). On May 20, 1975, the director adopted the same regulations for U.S. Convention waters which were promulgated by the Commission (JE 4), which included open weekly fishing periods with "gear limitations."

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Superior Court Findings
and Conclusions (9/19/75)

IV.

On June 26, 1975, a preliminary injunction (JE 5) was issued by U. S. District Court Judge George Boldt in U.S., et al v. Washington, et al (USDC WDW Cause No. 9213), enjoining the director from allowing any non-Indian fishing in convention waters until the Department adopts and files with said court satisfactory regulations which, in effect, provide special fishing rights for certain treaty Indians in said waters. On June 30, 1975, Judge Boldt postponed the effective date of said preliminary injunction for 10 days (JE 6) to give the director an opportunity to inquire whether the Commission would take some action to allow him to implement Judge Boldt's order. After the director had twice written the Commission suggesting certain alternatives which purportedly would comply with Judge Boldt's order (JE 7 and 8), the Commission met on July 8, 1975 and declined to change its regulations to give the director authority to implement any of his proposed alternatives (JE 9). In the meantime, on July 6, 1975, the Convention fishery opened as scheduled under the Commission regulations as adopted and approved by the two countries.

On July 11, 1975, a hearing was held in Judge Boldt's court and, thereafter, he again suspended the effective date of his injunction (JE 11). On July 16, 1975, Judge Boldt issued a permanent injunction (JE 12), with findings (JE 13), ordering the director to promulgate appropriate regulations immediately to insure that treaty Indians may fish with any gear authorized

by the State of Washington in all Convention waters (except state Area 2) when such waters are open to fishing by any U.S. fishermen, characterized as "gear flexibility," and a regulation which allows at least five days fishing in state area 2. The Commission regulations provided only two days fishing in Area 2. Judge Boldt again stayed the effective date of said injunction (JE 14) pending further discussions between representatives of the United States and Canada then scheduled for Friday, July 18, 1975.

Said meeting was held on Friday, July 18, 1975, but no agreement was reached. One of the U. S. representatives in attendance stated in an affidavit thereafter (JE 15), as supplemented by a letter from another U. S. State Department official (JE 16), that the United States has taken steps to suspend its approval of that part of the Commission regulations which allocates fishing to specific types of gear in the United States fishery. The Commission and the Dominion of Canada have vigorously protested this action (JE 17 through 24), and the Commission consistently insists up to the present time that its regulations have not changed from those originally approved by the United States on April 11, 1975 (JE 26 and 27). On July 22, 1975, after considering the above mentioned affidavit of the United States representative, Judge Boldt again stayed his injunction (JE 28).

On July 30, 1975, Judge Boldt modified his injunction of July 16, 1975, by deleting that portion thereof ordering the director

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to adopt a five-day-a-week fishery for Indians in Area 2, but he left the "gear flexibility" portion permitting treaty Indians to fish continuously with any lawful gear during the entire fishing period, and he also vacated his earlier stay thereby making the injunction immediately effective (JE 33).

V.

In the meantime, from the time that Judge Boldt originally entered his preliminary injunction on June 26, 1975, until his later permanent injunction was finally made effective on July 30, 1975, the director adopted several regulations in order to comply, alternately, with Judge Boldt's and this court's orders.

First the director complied with Judge Boldt's preliminary injunction of June 26, 1975, by adopting (but not filing) Order No. 1218 (JE 10). Then he complied with Judge Boldt's permanent injunction of July 16, 1975, by adopting Order Nos. 1218, 1226 and 1229 (JE 29, 30 and 31) which provided "gear flexibility" for treaty Indians fishing in convention waters (except Area 2), and which provided a five-day-a-week fishery for Indians in Area 2. Then he complied with this court's preliminary injunction of July 23, 1975, by adopting Order No. 1231 (JE 32) which suspended Order Nos. 1218, 1226 and 1229. Next, he complied with Judge Boldt's modified injunction of July 30, 1975 by adopting Order No. 1234 (JE 34), which readopted his previously suspended order allowing "Gear flexibility" to treaty

Indians in U. S. convention waters. Thereafter he complied with this court's amended preliminary injunction of August 1,1975, by adopting Order No. 1238 (JE 35), which suspended Order No. 1234. He also attempted to relinquish his enforcement control over Commission regulations by suspending (JE 36) his early Order No. 1210 (JE 4) which had been a verbatim adoption of the original Commission regulations, but Judge Boldt would not permit this. On each of said occasions when the director adopted regulations to comply with Judge Boldt's injunctions, he did so, not for purposes of conservation to fulfill the department duty and purpose under RCW 75.08.012, but solely to comply with Judge Boldt's injunctions.

VI.

On August 6, 1975, a further hearing was held before Judge Boldt, at which time a handwritten note (JE 37) dated July 19, 1975, by a Deputy Assistant Secretary of State for Ocean and Fisheries Affairs was introduced into evidence, which stated that he was withdrawing "for the government of the United States of America the approval given on April 11, 1975, to those parts of the regulations of the International Pacific Salmon Commission transmitted by letter of February 24,1975, which allocate open fishing times among the various types of gear within United States convention waters." Thereafter, on that same date, Judge Boldt issued an injunction (JE 38) enjoining this court from enforcing its amended preliminary injunction and staying further proceedings herein. He also ordered the director to

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repromulgate the regulations which provided for a special Indian fishery and which adopted the Commission regulations. He also made further findings (JE 39). He denied the State's motion for a stay. The request for this injunction to stay the state court proceedings was by oral motion on the day it was issued and no notice thereof of any kind was given to any of the parties or to this Court prior to its issuance. In his Conclusion of Law No. 62, Judge Boldt concluded that "the Commission regulations, as approved by the United States, allow fishing time without regard to gear limitations." Although Judge Boldt purportedly found (Finding No. 284) that the Commission regulations had changed so that they no longer provided for "gear limitations," the Commission itself, by telegram dated July 31, 1975, from Mr. A. C. Cooper, the Director of the Commission, stated that "Scheduled regulations for United States convention waters are still as originally approved by the Commission and by the U. S.Government in its letter of April 11, 1975, from W.L. Sullivan to Commission Chairman W.R. Hourston."

VII.

The Commission regulations have not changed, and they are still as originally adopted by the Commission and approved by the United States on April 11, 1975 (JE 3), and they provide for "gear limitations" by allocating the open fishing periods among various types of gear.

Superior Court Findings
and Conclusions (9/19/75)

VIII.

Also on August 6, 1975, Judge Boldt heard the motion of the Swinomish Tribe for a preliminary injunction prohibiting the state from enforcing closures in U.S. convention waters against the Swinomish, as long as nets with largesize mesh were used (purportedly effective to catch Chinook salmon rather than sockeye or pink salmon). Judge Boldt ordered the director to ask the Commission for approval or authority to allow this fishery and indicated he would otherwise grant the injunction. That request was duly conveyed to the Commission. On August 8, 1975, Judge Boldt issued a preliminary injunction (JE 40) enjoining the State of Washington from prohibiting any Swinomish Indians from fishing in certain U. S. convention waters as long as they fish for Chinook salmon with a specified size net. The Swinomish regulation allows fishing seven days per week. The Commission has not authorized this fishery and there is no state regulation or law allowing it.

IX.

On August 8, 1975, solely to implement Judge Boldt's injunction of August 6, 1975, and not for purposes of conservation to fulfill the department's duty and purpose under RCW 75.08.012, the director promulgated Order Nos. 1244 and 1245 (JE 41 and 42) which are repromulgations of prior regulations which had been suspended or repealed because of court injunctions. Order No. 1244 provides "gear flexibility"

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by authorizing certain treaty Indians to fish with any type of lawful fishing gear continuously in all U.S. convention waters when such waters are open to fishing by any United States fisherman. Order No. 1245 is a repeal of Order No. 1239 and it reinstates Order No. 1210 and readopts the original Commission regulations providing for "gear limitations" by allocating the open fishing periods among various types of gear. Because of Order No. 1244, however, Order No. 1245 only applies to non-Indians and does not apply to treaty Indians.

X.

This court having found that the current Commission regulations are the same as those which were approved by the United States on April 11, 1975 (JE3), the individual plaintiffs and members of plaintiff associations will suffer irreparable harm if Order No. 1244 were held to be valid. If, on the other hand, this court had found that the current Commission regulations were modified so that they do not provide for "gear limitations," then the individual plaintiffs and members of plaintiff associations would suffer irreparable harm if that portion of Order No. 1245 were found to be valid which does provide for "gear limitations."

XI.

On March 22, 1974, Judge Boldt denied the motion of plaintiff PSVOA to intervene in U. S. v. Washington (JE 45). Thereafter, on June 28, 1974, in response to an inquiry by Judge Hewitt Henry of this court

and on the motion of the Washington State Commercial Passenger Fishing Vessel Association (Charter Boat Association) to intervene in U. S. v. Washington, Judge Boldt orally in open court (plaintiffs' Ex. 1) denied the motion to intervene, acknowledged that the state courts had jurisdiction over the issues raised by said Charter Boat Association (which was similarly situated to plaintiffs PSVOA herein), and ruled that he was abstaining from exercising that jurisdiction himself. Thereafter, on July 18, 1974, while he denied said Charter Boat Association's motion to intervene (JE 46), Judge Boldt specifically provided in his denial that the Association's motion was ". . . without prejudice to the right of said Association to file such a motion subsequently after first seeking relief through the courts of the State of Washington."

XII.

The questions raised herein with respect to the jurisdiction of the Commission, the Director of Fisheries and/or the U.S. District Court over the fishery in U. S. convention waters will continue to recur unless the issues raised herein are resolved.

CONCLUSIONS OF LAW

I.

This court has jurisdiction over the parties and the subject matter of this action.

Superior Court Findings
and Conclusions (9/19/75)

II.

This court has the duty to observe the oath of its office, which is to obey the laws and Constitution of the State of Washington and the laws and Constitution of the United States of America. Implicit in observing this oath is this court's duty to make its own judgments in determining if there are matters involved in this case which invoke the jurisdiction of this court, and this court cannot be subject to any external pressure to decline jurisdiction, and under the principal of comity, this court may assume jurisdiction of this cause. It is not unreasonable or unlawful for a citizen to seek a remedy in this state's court of general jurisdiction for an alleged wrong, and certainly there has to be a court somewhere that will hear the case.

III.

This court is required to assume jurisdiction in order to determine the issues involving questions testing the validity of Washington law and its application to citizens of Washington.

IV.

In interpreting 28 USC 2283, any doubts as to the propriety of a Federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.

Superior Court Findings
and Conclusions (9/19/75)

V.

In regulating fishing in convention waters, the State Director of Fisheries is authorized by RCW 75.40.060 to adopt the regulations of the International Pacific Salmon Fisheries Commission, and he cannot promulgate regulations which vary from or expand the regulations of said Commission promulgated under the authority of the Convention between the United States and the Dominion of Canada.

VI.

The authority granted the director by RCW 75.40.060 is plain and unambiguous, and is limited to an adoption and enforcement of regulations promulgated by the Commission established by international treaty. Any attempt by the State Department of Fisheries, such as Order No. 1244, to expand on the authority granted by this statute would be unlawful as an interference with a treaty between the United States and a foreign nation and in this case a violation of state law.

VII.

This court having found that the Commission regulations have not changed from those regulations approved by the United States on April 11, 1975, then Order No. 1244 of the Director of Fisheries, is invalid, since it provides for "gear flexibility" by authorizing certain treaty Indians to fish with any type of lawful fishing gear

continuously in all U. S. convention waters when such waters are open to fishing by any United States fishermen, and the Commission regulations do not provide for such "gear flexibility."

VIII

Order No. 1244 is also invalid because in adopting said order, the director was exceeding his statutory authority because he was not exercising the duty and purpose of the Department of Fisheries under RCW 75.08.012 relating to conservation.

IX.

Regulations adopted by the Director of Fisheries, which exceed his statutory authority under state statutes, are invalid as a matter of law.

X

This Court declines to decide the question as to whether or not the Swinomish fishery, in U. S. convention waters, by use of nets with increased mesh size, is in violation of state law, because the Swinomish Indians are not a party to this action.

DATED this 19th day of September, 1975.

/s/ GERRY L. ALEXANDER
JUDGE

Presented by:

/s/ JOSEPH T. MIJICH
of Attorneys for Pl.

/s/ J.A. MIKKELBORG
Of Attorneys for Pl.

/s/ J. M. Johnson
of Attorneys for Def.

Supreme Court Order(9/23/75)

IN THE SUPREME COURT OF STATE OF WASHINGTON

PURSE SEINE VESSEL OWNERS ASSOC., a Washington non-profit corporation; RICHARD C. JOHNSON; PUGET SOUND GILLNETTERS ASSOC., a Washington non-profit corporation; and DAVID MILHOLLAND, Respondents,

v.

DONALD W. MOOS, Director, Washington State Department of Fisheries; and STATE OF WASHINGTON, Department of Fisheries, Appellants.

ORDER DENYING STAY

No. 43938

On September 19, 1975, appellants in the above entitled case appealed to the Supreme Court from the judgment entered in Thurston County Cause No. 52881, and on the same day moved for a stay of the judgment pending disposition of the appeal.

The motion for stay of judgment having come on for hearing by the en banc Court on September 22, 1975; and the Court having reviewed the brief of appellants in support of stay, the brief of respondents opposing stay, the brief of the Thurston County Prosecuting Attorney, the memorandum of amicus curiae filed on behalf of the United States, and the memorandum of amicus curiae filed on behalf of the Nooksack and Suquamish tribes; and heard oral argument presented by the Assistant Attorney General James Johnson on behalf of appellants, Joseph Mijich on behalf of respondents, U. S. Attorney Stan Pitkin as amicus curiae and

Supreme Court Order (9/23/75)

Thurston County Prosecuting Attorney Patrick Sutherland as amicus curiae on behalf of the Superior Court; and

The members of the Court having determined by a six to three vote that the motion for stay of judgment should be denied; Now, therefore, it is hereby

ORDERED that the motion for stay of judgment entered in Thurston County Cause No. 52881 pending appeal is denied.

DATED at Olympia, Washington this 23rd day of September, 1975.

/s/ CHARLES F. STEFFEN
CHIEF JUSTICE

District Court Injunction (8/6/75)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES, et al.,
Plaintiffs,
vs.
STATE OF WASHINGTON, et al.,

Civil No. 9213

INJUNCTION STAYING PROCEEDINGS IN CAUSE NO. 2881 BEFORE THE SUPERIOR COURT

This matter having come on for hearing upon motion of Plaintiff, United States of America, the Court having considered all evidence, briefs and oral argument of the parties, it is hereby ORDERED as follows:

1. The Court finds and concludes that it is necessary, in aid of this Court's jurisdiction, to protect and effectuate the judgment of this Court and to give rights guaranteed Plaintiff Indian tribes by Congressional approved treaties their intended scope, pursuant to 28 U.S.C. 2283, to stay and enjoin further proceedings in the Superior Court of the State of Washington for Thurston County.

2. The injunction issued by the aforementioned Superior Court in Purse Seine Vessel Owners Assoc., et al., v. Donald W. Moos, et al., (Cause No. 2881) dated July 23, 1975 and amended on August 1, 1975 is hereby stayed.

3. The Superior Court of the State of Washington for Thurston County is hereby enjoined, pursuant to 28 U.S.C. 2283, from enforcing the injunction referred to in paragraph 2 above; and further proceedings in Cause No. 2881, are hereby stayed pending further order of this Court.

4. This Court hereby reaffirms its Findings of Fact, Conclusions of Law, and Order of July 16, as amended on July 30 and on this date; and directs the State of Washington, its Department of Fisheries and the Director thereof, to re-promulgate the regulations rescinded by the Director of Fisheries by Orders No. 1238 and No. 1239 on August 1, 1975. (Exhibits F-84 and F-87 respectively).

5. The motions of the Defendant State of Washington for a further stay of the Court's order and for certification of the Court's order for expedited appeal are hereby denied.

ORDERED and DATED this 6th day of August, 1975.

/s/ DEAN H. BOLDT
SENIOR UNITED STATES DISTRICT COURT JUDGE

Presented by:

/s/ STAN PITKIN
STAN PITKIN
United States Attorney

Court of Appeals Order (8/20/75)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al., Petitioner,	)	No. 75-2835
vs.	)	
UNITED STATES OF AMERICA, et al., Respondent	)	ORDER

Before: BROWNING and TRASK, Circuit Judges

Upon due consideration, petitioners' motion for stay filed August 18, 1975 is hereby denied.

/s/ JAMES R. BROWNING

/s/ OZELL M. TRASK

FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-588, 75-592

STATE OF WASHINGTON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

and

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, *Petitioner*,

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

BRIEF OF RESPONDENT INDIAN TRIBES IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-588, 75-592

STATE OF WASHINGTON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

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BRIEF OF RESPONDENT INDIAN TRIBES IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The district court's opinion appears at 384 F.Supp. 312.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On the Petitions for Certiorari:

1. Does the decision of the court of appeals conflict with *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968) by limiting the exercise of state police power over federally secured Indian treaty rights to situations where it can be demonstated that state regulation is necessary for conservation, *i.e.*, to preserve or maintain the fishery resource?

2. Did the court of appeals properly sustain a limited right of tribal self regulation of treaty fishing?

3. Did the court of appeals err in upholding the district court's equitable discretion to fashion remedies assuring fair apportionment of fishing opportunity?

4. Is there a conflict between the 1937 Convention with Canada and the Indian treaties?

On Respondents' Conditional Cross Petition:

5. Has the United States authorized the State of Washington to use its police power to regulate or curtail the exercise of federally secured Indian treaty fishing rights?

TREATIES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Six treaties between the respondent United States and the respondent Indian tribes each secure continuing off reservation fishing rights to the tribes in almost identical language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 28, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty with the Yakima, June 9, 1855, 12 Stat. 951; Treaty with the Quinaeilt, July 1, 1855, 12 Stat. 971.

Respondents, plaintiffs below, predicated their basic claims upon the supremacy clause Article VI, United States Constitution which requires that:

> all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The State of Washington petitioners have contended that the 1937 Convention with Canada (50 Stat. 1355), a 1957 protocol amending it (T.I.A.S. 3867, 8 U.S.T. 1057), and federal statutes pertaining to it are involved. The provisions deemed to be pertinent are reprinted in their Petition/Appendix at pp. 95-100.

STATEMENT OF THE CASE

Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, claiming that state regulatory provisions and practices impinged upon the rights of Indians to fish in Western Washington waterways as guaranteed in six treaties between the tribes and the United States. Jurisdiction was invoked under 28 U.S.C. § 1345. Shortly afterwards a number of Indian tribes party to the treaties intervened as plaintiffs. The district court assumed jurisdiction over their claims pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4) and 1362. The Departments of Fisheries and Game and their respective directors were permitted to intervene as defendants in order to assert their divergent positions on the issues raised. The Washington Reef Net Owners Association also was permitted to intervene.

The plaintiffs sought declaratory relief concerning the extent of treaty secured Indian fishing rights, whether the state had interfered with their exercise, and the degree to which the state lawfully could, if at all, limit or regulate the exercise of such rights. They sought injunctive relief to provide protection and enforcement of those rights. The tribal plaintiffs contended that the state had no authority to regulate their treaty right or otherwise to deprive them of sufficient fish to meet their needs. Defendants' positions ranged from the Department of Game's denial of virtually all Indian treaty rights to the Department of Fisheries' request for a percentage quantification of the Indians' right under continuing total state regulation.

Through extensive pretrial activity and a lengthy trial a record was amassed including reports of experts in fisheries, biology and anthropology, hundreds of exhibits, and testimony of more than fifty witnesses. The district court issued its decision on February 12, 1974 along with some 253 Findings of Fact, and 48 Conclusions of Law.

The district court decision acknowledged the special nature of the Indians' treaty fishing right. It found unlawful as applied several state laws, regulations, and practices as inconsistent with rights under federal treaties and it recognized the tribes' limited right to regulate their members' treaty-secured off-reservation fishing rights. The court also adopted a formula to be used in the future in order to approach more nearly an equal sharing of the fishery resource between Indians and non-Indians, consistent with the purpose of the treaties.

The defendants appealed to the Ninth Circuit Court of Appeals from nearly every aspect of the lower court decision. The Indian tribes also appealed, questioning the decision insofar as it authorizes the state to regulate the exercise of treaty secured fishing rights. On June 4, 1975 the United States Court of Appeals for the Ninth Circuit affirmed the district court decision; subsequently it denied petitioners' request for rehearing.

Summary of Facts

Before American settlement of the Washington Territory, Indians were widely dispersed in communities throughout the area.

> The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social cus-

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> toms, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons.

520 F.2d 676, 682.

In 1855 the United States sought the Indians' acquiesence in treaties. This was necessary to facilitate occupation and development of the territory by an increasing number of settlers without the inevitable bloodshed and delay of armed conflict and conquest. Within seven months the six treaties involved in this case were negotiated. They provided for extinguishment of Indian claims to most of the vast land area which is now the State of Washington, leaving the Indians a few parcels of land for residence purposes. In return, the Indians received promises of small sums of money and certain goods and services. But the matter of greatest importance to the Indians was the assurance that they would be able to continue fishing as they had in the past, notwithstanding the fact that they might be required to live on reservations.

The treaties were in English, a language which few, if any, Indians present at the negotiations either spoke or read. Although negotiations were in the Chinook jargon, a trade medium of some 300 words which was understood by some Indians, the district court found the jargon inadequate to express precisely the legal effects of the treaty.

The Indian negotiators neither intended nor understood the treaty to limit their right to fish in any way. To provide for their future survival, they insisted upon retaining fishing rights throughout the areas they had

used in the past. They were given the unqualified assurance of the United States negotiators that they would be able to do so. They consented only to share their "usual and accustomed" fishing places with the non-Indian citizens.

At the time of the treaties Indians were trading fish in substantial volume. The treaty negotiators for the government were aware of Indian commerce in fish and understood the contribution of Indian fishermen to the territorial economy, as Indians supplied most of the fish used by non-Indians.

Anadromous fish must return from the sea to their fresh-water streams of origin to spawn in sufficient numbers to assure that there will be future generations. This concept, known as "escapement", dictates that a portion of each run of fish must escape harvest.

Early in the twentieth century, development of a non-Indian commercial fishing industry and rapid population growth began to threaten continued existence of the fish runs and diminish fishing opportunities of both Indian and non-Indian fishermen. Consequently, the State of Washington undertook to regulate the taking of fish to prevent the resource from being destroyed. The prospect of non-Indian regulation had not been suggested to or anticipated by the Indian parties to the treaties.

For many years after the treaties Indians continued to fish as in the past. They successfully assured perpetuation of the fishery resource by enforcement of tribal customs and practices. As conditions changed, however, they recognized the desirability from the standpoint of conservation of having formal regulations of their members' fishing. By setting seasons, closed periods,

gear restrictions, and limiting the number of fishermen, tribes acted to assure that sufficient fish would escape for spawning purposes. Some hired fishery biologists; many utilized expert biological advice from the U.S. Fish and Wildlife Service, an agency of the Department of the Interior. Several tribes, independently or with the United States, initiated fish propagation programs. Indian fishing practices were responsible and effective. Indeed, the district court expressed surprise that in spite of broad allegations and lengthy, vigorous litigation, the state could only produce one uncorroborated instance of Indian off reservation fishing rights being exercised in a manner detrimental to the perpetuation of fish.

The State of Washington was not content to allow Indian tribes to regulate their own treaty fisheries, at least outside the reservations. The state assumed that Indians were subject to its regulatory schemes and utilized state laws and enforcement mechanisms to restrict and prohibit treaty right fishing. The agencies charged by state law with regulation of fishing had goals other than merely assuring survival of the species. As demands upon the harvestable fish—those in excess of spawning escapement needs—escalated tremendously, the Departments of Fisheries and Game allocated fish among commercial and sports users, guided by public policies developed by the state legislature and Game Commission. This system, which failed to consider Indian needs in regulating the state's fish harvests, resulted in a decreasingly significant number of fish being available to Indians. By the time this case was brought, the Indians' treaty off reservation fishery was taking only 5% of the total harvest.

Non-treaty commercial fishing generally occurs before anadromous fish enter the waterways where most Indian usual and accustomed fishing places are located. Washington's management program deprived Indians of the opportunity to share in those fisheries by allocating most or all of the harvestable fish to others before they reached the Indians' fishing places. Any attempts by Indians to harvest the remaining fish typically have been curtailed by imposition of state laws to protect escapement.

A long, acrimonious, and occasionally violent dispute between the tribes and the state has grown out of its fishing management under laws and regulations oriented toward policy goals inconsistent with the exercise of Indian treaty rights. Predictably, the clash triggered considerable judicial activity. *E.g., Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973); *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968); *Tulee* v. *Washington,* 315 U.S. 681 (1942); *United States* v. *Winans,* 198 U.S. 370 (1905). *See also Antoine* v. *Washington,* 420 U.S. 194 (1975).

Each decision of this Court, of the Ninth Circuit Court of Appeals, and of most state appellate courts, has provided general principles for the guidance of the state in its regulation and management vis à vis Indian treaty fishermen; each has recognized that Indians are not subject to state fishing regulations as a matter of course. But judicially announced principles have been interpreted restrictively by the state and applied reluctantly only in factual contexts identical to the cases in which they arose.

More often than not, Indians have had to risk pain of criminal prosecution to test their treaty rights in court by way of defense. Isolated issues were decided piece-

meal. It was not until this case that a court was asked to deal comprehensively with the panoply of concrete problems of an entire region created by the state management and regulatory system, in light of the meaning and intent of the treaties.

Remedies of the District Court

The district court found that state regulations as framed and enforced preferred non-Indian fishermen over Indians. In many instances the state allowed all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reached the plaintiff tribes' usual and accustomed fishing places where treaty rights apply. And the state had closed a substantial number of Indian usual and accustomed fishing areas to Indian net fishing by others while permitting net fishing elsewhere on the same runs of salmon.

The court concluded that state enforcement of fishing laws and regulations against Indians exercising treaty fishing rights at their usual and accustomed fishing places has prevented full exercise of those rights. Enforcement of state law has caused loss of income to the Indians, inhibition of their cultural practices, unlawful confiscations, damage to fishing equipment, arrests and criminal prosecutions. Several corollary matters not relevant here were also determined.

Relief was fashioned based on an extensive exploration of the intent and understanding of the treaties. Policies, practices and laws responsible for many state abuses in derogation of the Indians' treaty rights were declared to be unlawful. Limits of state power over Indian treaty fishermen were defined: the state may

restrict Indian fishing only when it is demonstrated to be necessary to preserve or maintain the resource.

State regulations bring with them a threat of criminal sanctions which has a chilling effect on the exercise of treaty rights. In view of Washington's past practices the district court required regulations (except emergency measures) to be shown to the tribes or the court to be bona fide conservation measures before the state enforces them against treaty fishermen.

The district court recognized the tribes' ability to regulate their members' off reservation treaty fishing upon meeting several stringent conditions and qualifications, but subject to state control whenever a conservation need is shown. A principle of equal sharing of the opportunity to harvest fish destined for Indian usual and accustomed fishing places between Indian and non-Indian fishermen was effectuated through the use of a formula which considers the peculiar aspects of the fisheries as well as the meaning of the treaties. *United States* v. *Washington*, 343 F.Supp. 312 (W.D. Wash. 1974). The court of appeals affirmed the district court on virtually all points *United States* v. *Washington*, 520 F.2d 696 (9th Cir. 1975).

SUMMARY OF ARGUMENT

The treaty fishing right has never been abrogated by act of Congress, subsequent treaty or otherwise. Nor has Congress extended jurisdiction over treaty fishing to the state. But under Supreme Court decisions the state may lawfully impose its regulations on treaty fishermen when it is necessary to do so for conservation. Before a particular measure can be enforced against treaty fishermen by the state it must be shown to be one which is necessary to preserve and maintain the fish,

not simply to carry out state management policies. If the state and a tribe cannot agree that a measure is properly for conservation, the continuing jurisdiction of the court may be utilized to obtain a determination. In the first instance, however, regulation of treaty right fishing should be the responsibility of the tribes acting through their own tribal courts and law enforcement personnel.

Allocation of the opportunity to fish between treaty and non-treaty fishermen should be on a principle of equal sharing. The bargaining positions and understanding of the parties at the time of the treaties dictate that the Indians' share must not be eroded to insignificance by application of state policies designed to further the interests of non-Indians. The formula for guiding the state in allocating fishing opporunity was a reasonable one, adapting the realities of the fisheries to the rights of the parties. To the extent the formula may prove unworkable or unjust, relief can be sought from the district court.

All conservation needs are carefully protected by the decision below and the state is not hindered in its ability to preserve and maintain the fisheries. Respondents find the district court decision as affirmed by the court of appeals to be an acceptable and practical accommodation of rights under the treaties. It comports with decisions of this Court and there is no reason for this Court to grant certiorari. If, however, the decision below is to be subjected to Supreme Court review, so should the overall question of whether the state has any power over Indian treaty fishing.

ARGUMENT

I. The Decision Of The Court Below, Requiring A Showing Of Conservation Necessity Before The State May Regulate Indian Treaty Fishing, Is Consistent With *Puyallup Tribe v. Department of Game.*[1]

In *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968) (*Puyallup I*), this Court upheld a state supreme court decision that the exercise of Indians' treaty protected fishing rights could not be restrained by Washington's prohibition of all net fishing unless the law "has been established to be reasonable and necessary for the conservation of the fishery." *Department of Game* v. *Puyallup Tribe,* 70 Wash.2d 245, 422 P.2d 754 (1967).

The Court set forth standards in *Puyallup I* to guide the state in making the conservation determination on remand. The decision stated that "the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State." 391 U.S. at 399. But it also said the state has a limited kind of police power, enabling it to regulate treaty fishing when it is "necessary for the conservation of fish", citing dicta in *Tulee* v. *Washington,* 315 U.S. 681 (1942). The Court cautioned that stricter scrutiny is required of measures for regulating treaty Indians than for regulating non-Indians because "[t]he measure of legal propriety of those

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[1] The tribal respondents have challenged the correctness of *Puyallup I* in the district court and on appeal. In this section they demonstrate that the courts below adhered to that decision. By a conditional cross petition, to be granted only if the Court grants certiorari in Nos. 75-588 and 75-592, respondent tribes ask that this Court determine whether the state may regulate Indian treaty fishing at all. See Argument V.

kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State." 391 U.S. at 401 n. 14. The Court also said state regulations of treaty fishing must meet "appropriate standards" and "not discriminate against the Indians."

After remand, the Department of Fisheries changed its regulations to permit certain limited Indian net fishing, but the Department of Game continued its total ban on taking steelhead by net. The state supreme court ruled that the ban on nets by Game was a proper conservation measure because there were only enough fish in the Puyallup River for sport fishermen and escapement, thus any Indian fishing would be contrary to conservation. *Department of Game* v. *Puyallup Tribe,* 80 Wash.2d 561, 573, 497 P.2d 171, 178-79 (1972). However, this Court rejected Game's management scheme as discriminatory even though it was carried out in the name of "conservation", because it preferred the interests of sport fishermen over treaty right fishermen. *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973) (*Puyallup II*). The Court made it clear that state policies and goals, beyond preservation of the species, cannot be cloaked in a mantle of "conservation" to curtail Indian treaty fishing.

> Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon . . . .

414 U.S. at 49.

In this case the court of appeals upheld the district court's definition of "conservation" as the perpetuation of a run or species of fish. 520 F.2d at 683. "The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing." 520 F.2d at 687. This is the teaching of *Puyallup II*.

State fish managers often include broader objectives than perpetuation of the fishery (*e.g.*, "providing for an orderly fishery" and "assuring the maximum sustained harvest") in their definition of conservation. But "the only rationale for permitting state interference with Indian fishing precludes adoption" of a definition which forces "treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens." 520 F.2d at 686.

Following *Puyallup II*, the court also validated state regulation as a vehicle for the "protection of the interests of all those entitled to share" in the resource (384 F.Supp. at 402) and held that, because "[b]y the treaty, the Indians granted citizens of the territory the right to fish in common with them, . . . the state may [also] enforce regulations insuring that both groups have fair access to the fish at the treaty areas."[2] 520 F.2d at 687. But the court found that Washington had not used its regulatory power to effect such fairness.

> Certainly, [the Indians] did not understand that in permitting other citizens access to their tradi-

[2] Compare the language of this Court in *Puyallup II*: "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. at 49. The formula to be used in assuring fair apportionment of harvestable fish is discussed in section III, pp. 21-25, *infra*.

> tional fishing areas they were submitting to future regulations calculated to benefit those other citizens.
>
> Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory.

520 F.2d at 685.

The petitioners balk at the requirement of the court below that a "regulation of treaty right fishing must be . . . established by the state, either to the satisfaction of all affected tribes or . . . [the district] court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." 384 F. Supp. at 342. The alarm of petitioners over this requirement is not justified.[3] The district court's supervisory authority does not impede the state unreasonably in its management and regulation of the fishery. Subject to the Indians' right to an equal opportunity to fish, the state may regulate non-Indians to achieve whatever goals it chooses. And the ability of the state to respond to unforeseen conservation needs was preserved by the district court. Emergency regulations (which constitute nearly all of the restrictions

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[3] The apocalyptic fears that Indians will destroy the fishery expressed by petitioners, especially the Northwest Steelheaders Council, are disingenuous. Nothing in the record supports any past history or future likelihood of Indians' abusing the treaty right to the detriment of the resource. In fact, the contrary is true. *See* 384 F Supp. at 338 n. 26. Even if, as petitioners suggest, Indians desired to use poison or dynamite to harvest fish, or to place their nets across river mouths and entrances to hatcheries, adequate conservation powers remain with the state to prevent such acts.

promulgated during a fishing season) may be imposed upon Indian treaty fishermen *without* prior court review. 384 F.Supp. at 417. Further, the state continues to determine escapement goals and how many fish are harvestable by all fishermen.

Although the tribes may develop in their governing bodies and enforce in their own courts regulations concerning their members' fishing, all proposed regulations must be discussed first with both Fisheries and Game and they must include any state regulations which are reasonable and necessary for conservation. If a tribe has not qualified as "self regulating", the state may enforce regulations which are necessary for conservation directly upon Indian fishermen. Further, the tribes must provide catch reports to the state and permit the state agencies to monitor their off-reservation fishing for conservation reasons.

Even absent strong legal reasons, it would not have been surprising for an equity court to refuse to leave the state as the sole arbiter of which laws are necessary for conservation and shall be applied to Indians. The district court found far reaching abuses of this power by the state in the past. *E.g.*, 384 F.Supp. at 358, 365, 367, 369, 374, 388, 390, 393, 403-04. Indeed, the district court found that "state regulation . . . is highly obnoxious to Indians and in practical application adds greatly to already complicated and difficult problems . . . ." 384 F.Supp. at 339.

The court of appeals pointed out that in regulating Indians the state is "not enforcing state policies but applying federal rights to concrete situations." 520 F.2d at 687. For this reason the district court "wisely" retained approval authority over state regulations of

treaty fishing.[4] To assist in the court's exercise of continuing jurisdiction and assure its ability to respond promptly and intelligently to the needs of the parties it appointed the magistrate to act as a special master and an eminent fishery biologist to serve as its fisheries advisor.

The continuing involvement of the district court in fisheries management in order to protect federally guaranteed rights is assailed by petitioners. This was a concern of the court of appeals, too. But the necessity for it is directly attributable to the petitioners' own demonstrated hostility to Indian treaty fishing.

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sport fishing allies) which produced the denial of Indian rights requiring intervention by the district court.

520 F.2d at 693.

II. Preservation Of A Limited Right Of Tribal Self-Regulation Is Consistent With Congressional Policy And Decisions Of This Court Barring State Interference With Tribal Self Government.

A restriction of state regulatory authority over Indians exercising a federal treaty fishing right does not imply that Indian fishing can take place unregulated. The record shows that historically this has not been the

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[4] In another treaty fishing rights case, Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969) the district court retained continuing jurisdiction. For 6 years the court regularly has determined whether state fishing regulations challenged by Indians are reasonable and necessary for conservation.

case; the Indians have always been concerned for the preservation of the fisheries and have acted responsibly to protect the runs. The district court found that the respondent tribes have governing bodies capable of promulgating and enforcing their own off reservation fishing regulations.

This Court has said recently that Indian tribes possess independent authority and have "attributes of sovereignty over *both* their members and their territory." *United States* v. *Mazurie,* 419 U.S. 544, 577 (1975) (emphasis added). And Congress has fostered the concept of tribal self government through enactment of the Indian Reorganization Act [5] and other legislation [6] designed to strengthen tribal government.

The treaties were not grants to the Indians, but grants to the United States from which the tribes reserved certain rights. This Court has said of the treaties in this case that "[r]eservations were not of particular parcels of land . . . [but rather] imposed a servitude on every piece of land" to make possible continued fishing by the Indians. *United States* v. *Winans, supra* at 381 (1905). There is not the slightest intimation that the Indians thought they would be yielding authority over their fishing right "reservations" to some future government any more than they were consenting to incursion of such authority over lands reserved for their occupancy. "If this power is to be taken away from them, it is for Congress to do it." *Williams* v. *Lee,* 358 U.S. 217, 223 (1959). In another

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[5] 25 U.S.C. §§ 461-479. See Williams v. Lee, 358 U.S. 217, 220 (1959); Morton v. Mancari, 417 U.S. 535, 542 (1974).

[6] *E.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341; Indian Self Determination Act, 25 U.S.C. (Supp.) §§ 450-450n.

case involving one of the same treaties the court of appeals found that "[t]he Indians must surely have understood that Tribal control would continue after the Treaty." *Settler* v. *Lameer,* 507 F.2d 231, 236 (9th Cir. 1974).

This Court consistently has barred interference with tribal self government when a tribe's internal affairs are involved. See *Williams* v. *Lee, supra; McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973). The authorization and regulation of tribal members exercising a tribally reserved and held right at a "usual and accustomed fishing place" is as much an internal affair as regulating the conduct of tribal members within land reservation boundaries. And the tribes should be able to determine and pursue their own policies through their regulations just as the Departments of Fisheries and Game utilize their regulatory power over non-Indians to pursue differing policy goals.

The district court recognized this Court's acknowledgement of a sphere of permissible state power over off-reservation Indian treaty fishing. Thus, the state shares jurisdiction over Indian fishing, the limits upon state authority being defined by conservation necessity. Neither the tribes nor the state may preempt the jurisdiction of the other.[7] 384 F.Supp. at 403. But the

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[7] This is not, as petitioners suggest, the "duality of sovereignty" discussed in New York *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916). There the Court disapproved a division of authority where "either [the Indians or the state] would be free to destroy the subject of the power" because "neither could exercise authority with respect to the other at the *locus in quo.*" 241 U.S. at 563. But here "the essential power of preservation" is maintained in the state.

In any event, *Kennedy* is inapposite. It involved a private transfer of land; not a treaty with the United States. The docu-

state may regulate the fishing of any tribe at any time if it is necessary for conservation. The only exception to this is that a tribe which has met the stringent qualifications and conditions for "self-regulation" must adopt and itself enforce the state conservation measure. 384 F.Supp. at 340-41. A tribe which does not comply may be stripped of its self-regulating status.

"[T]he legitimate conservation interests of the state are not infringed" by allowing tribal regulation subject to court imposed conditions insuring tribal responsibility in the first instance, with a fail-safe providing for the imposition of state regulation if necessary for conservation. 520 F.2d at 686.

III. The Court Of Appeals Properly Upheld The District Court's Equitable Remedies Providing For Fair Apportionment Of Fishing Opportunity.

Based upon anthropological evidence of the Indians' most likely understanding of the treaty language, the fishing practices immediately following the treaties, and definitions of the language found in contemporaneous dictionaries, the district court interpreted the treaty to mean that the parties should be entitled to share equally in the opportunity to fish.[8] At most, "the Indians may have been told or understood that

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ment there preserved "privileges", not rights. And the state was in existence at the time of the transfer in *Kennedy* so exercise of its powers could be anticipated.

[8] Familiar rules of treaty construction demand that treaties be interpreted as Indians would have understood them, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970), that any ambiguities be resolved in favor of the Indian parties, *e.g.*, McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973), and that treaty terms be liberally construed in favor of the Indians, Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians". 384 F.Supp. at 357, 355. But "[w]hite civilization has . . . engulfed that of the Indian," and a state policy under which Indian opportunity to fish is determined by their numbers, as it is with other citizens, "effectively allots them a decreasing share of the resource." 520 F.2d at 687.

Petitioners continue to argue that it is "unfair" for Indians, a small minority of the total state population,[9] to be able to harvest more fish per capita than non-Indians. Of such a contention this Court remarked "[t]his is certainly an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the nation for more." *United States* v. *Winans, supra,* 198 U.S. at 380. The Indians could not have intended that their rights "upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed" (*United States* v. *Winans, supra,* 198 U.S. at 381), would be progressively eroded. Furthermore, if the petitioners' reasoning were accepted, the Indian treaty rights would be effectively abrogated by attrition with every change in population that reduced the proportion of Indians. These treaty rights, of course, may only be abrogated by Congress.

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[9] Petition of State of Washington, et al. (No. 75-588) pp. 9, 29; Petition of Northwest Steelheaders Council of Trout Unlimited (No. 75-592), pp. 12, 17, 18. The figure of 794 Indian fishermen, which was a Fisheries Department estimate made prior to trial, is misleading. The record shows that the fourteen tribes party to the case (about half the number of tribes with treaty rights) have memberships totalling about 11,000, many of whom fish or would do so if not prevented by the state.

E.g., Menominee Tribe v. *United States*, 391 U.S. 404 (1968).[10]

The court of appeals approved the district court's decision that "[t]reaty Indians . . . are to have the opoprtunity to take up to 50 percent of the available harvest at their traditional grounds." 520 F.2d at 683.[11] Analogizing to the situation of cotenants, the court noted that

> In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. [Therefore, an] attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality.

Thus, it concluded, "the court's apportionment was well within its discretion." 520 F.2d at 688.

When this Court indicated in *Puyallup II* that numbers of harvestable fish must be "fairly apportioned" between Indian and non-Indian fishermen, it recognized some of the difficulties. 414 U.S. at 48. The decision below provides for an "additional equitable adjustment" to solve some of the practical problems of the state in determining and controlling with mathematical precision the numbers of fish of a total run which actually would be available to Indians at their fishing places—typically the "last stop" on the

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[10] Reductions in the non-Indian fishery necessitated by the decision below may be politically unpopular in Washington. The exclusive forum for resolution of political issues, and any modification of the Indian treaty right, is Congress.

[11] The state and its Fisheries Department first suggested an objective, percentage formula to the court (a "one-third" share for Indians of a less inclusive harvestable number). They apparently disagree now not with the fact, but the size, of the percentage.

upstream migration of the fish. The purpose of the equitable adjustment in fishing opportunity is "to compensate treaty tribes for the substantially disproportionate numbers of fish" destined for their fishing places but which are intercepted by non-treaty fishermen who are beyond control of the state. 384 F.Supp. at 344. The court of appeals found the adjustment to be within the district court's equitable discretion to the extent that it adds back into the total number of shared fish those caught by Washington's non treaty citizens while outside the state's jurisdiction.

Also affirmed by the appeals court was exclusion of the on reservation catch from the number of fish to be shared between Indians and non-Indians.[12] That right, of course, derives from another section of the treaty providing for the Indians' exclusive use of reservations and was not the subject of this litigation. In any event, there has been no disagreement between the parties that Indians have an exclusive fishing right on their reservations. The Indians could not have expected or intended that they would be required to share their exclusive on reservation fishing opportunities with non-Indians.

The equitable jurisdiction of a court provides considerable latitude in fashioning relief which is fair and appropriate, based upon the court's knowledge of the facts and the parties. As we have already shown, the actions of petitioners called for specific relief, calculated to remedy a long standing deprivation of federal rights. Careful scrutiny of the evidence con-

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[12] The state did not contest exclusion of fish harvested for subsistence and tribal ceremonial use from the number to be shared. 520 F.2d at 690.

cerning the treaty negotiations and the meaning of treaty language to the Indians, as well as evidence on the realities of fishery management, led to a decision providing for equal sharing of fishery opportunity. Far broader exercises of equitable discretion in other complicated situations regularly have been sustained by this Court.[13] Here the district court not only operated well within its discretion in fashioning a remedy to fit the problems it was asked to solve, but also made an apportionment of the right in a manner which "best effectuates what the Indian parties would have expected . . . ." 520 F.2d at 688.

IV. The 1937 Convention With Canada Does Not Conflict With The Indian Treaties.

The Convention Between the United States and Canada for the Protection of Fraser River Sockeye and Pink Salmon, 50 Stat. 1355 (1937), as supplemented by T.I.A.S. 3867, 8 U.S.T. 1058, provides for an equal division of the salmon harvest of the Fraser River between the two countries. The decision below is concerned only with allocation as between Indian and non-Indian fishermen of the United States' share of the fish.

The district court ruled that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [set up under the convention] must comply with regulations of the Commission." 384 F.Supp. at 411. In affirming the court of appeals held that "all persons, including Indians, [are] subject to Commission regulations."

[13] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) (school desegregation); Reynolds v. Sims, 377 U.S. 533, 585 (1964) (reapportionment).

520 F.2d at 690. To the extent the tribes are prevented from having an equal opportunity to harvest the United States' share of fish, because such harvests are beyond state regulation, an equitable adjustment must be made in fishing opportunity under the state's jurisdiction.

It seems clear that the 1937 Convention and legislation implementing it do not conflict with, and could not have been intended to abrogate, the Indian treaty fishing right. To so hold would be contrary to all established authority. See Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975).

Petitioners complain that since the decision below they have been ordered by the district court to disobey commission regulations. They do not state fully the circumstances of the controversy. In any event, that dispute is now before the Ninth Circuit Court of Appeals pursuant to petitioners' notice of appeal dated October 2, 1975. It is not properly here.

V. In The Absence Of A Congressional Grant Of Authority The State May Not Regulate Or Restrict The Exercise Of Treaty Fishing Rights.

Respondent Indian tribes urge by way of a conditional cross petition that if the Court grants certiorari, it should also review the threshold questions of whether or not prior decisions of this Court allowing state regulation of federal treaty rights are correct in the circumstances of this case.

In *Puyallup I* this Court held that "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is pre-

served." 391 U.S. at 399. Respondents believe that the decision below is entirely consistent with this precedent, but they have argued throughout the litigation that *Puyallup I* is not correct.

The district court devised a system of fisheries regulation and allocation which is fair to all and which will resolve a long and bitter dispute. Respondent tribes recognize the value of maintaining an equitable, practical solution which has been in effect for nearly two years. They also recognize that it was necessary for the court to vest ultimate conservation regulatory authority in the state under *Puyallup I*. The intent of the treaties was effectuated, but the exercise of rights under them was subjected to state police power. Consequently, if petitioners' challenges to this system are to be considered by the Court, so should be the challenge of the tribes to the existence of any regulatory authority in the state.

The supremacy clause of the United States Constitution mandates that a federal treaty concerning the taking of game overrides state game regulation power. *Missouri* v. *Holland,* 252 U.S. 416 (1920). Congress has especially broad prerogatives in the area of Indian affairs which exclude most exercises of state power. *E.g., Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965). And only express congressional acts can extend jurisdiction over Indians. *E.g., McClanahan* v. *Arizona Tax Commission, supra; Mattz* v. *Arnett,* 412 U.S. 481 (1973). Although state law generally can be applied as against Indians outside the reservation, there can be no application where, as here, it would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973). The preemptive authority of federal laws

concerning off-reservation activities of Indians regularly has been upheld. *E.g., Johnson* v. *Gearlds,* 234 U.S. 422 (1914). See also *Antoine* v. *Washington, supra.*

It has often been said that Congress may modify or abrogate Indian treaties unilaterally, or extend jurisdiction over Indian affairs all or in part to the states. Congress has done both in specific instances but it has never done so with respect to the treaty fishing rights here in question.[14] The only act of Congress granting jurisdiction over Indians to states (including Washington) prohibits the exercise of any jurisdiction which would deprive Indians of rights to exercise or control treaty fishing rights. 18 U.S.C. § 1162. See *Menominee Tribe of Indians* v. *United States, supra.*

The record establishes beyond question that the Indian parties did not intend to submit their fishing rights to the control of any then non-existent non-Indian authority. Nothing in the record or the treaties can support a contrary interpretation, especially in view of the rules of Indian treaty construction.[15]

In response to the contentions of the Indian tribes, the district court analyzed in some detail the decisions relied upon by the Court in *Puyallup I* for the proposition that there is state power over Indian treaty fishing. 384 F.Supp. at 334-39. The court found that

> to the present time there never has been either legal analysis or citation of a nondictum authority

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[14] The district court cited three instances in which Congress has failed to enact proposed legislation to terminate the Indian treaty fishing rights which are the subject of this case. 384 F.Supp. at 338 n. 24.

[15] See *supra* note 8.

> in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

384 F.Supp. at 338.

Nevertheless, the court felt bound by judicial duty to conform its decision to Supreme Court authority and therefore rejected the tribes' contentions. The tribes appealed, but the court of appeals upheld the district court decision, stating simply that the tribes' "assertion is foreclosed by the decision in *Puyallup* . . . ." 520 F.2d at 682 n. 2.

The decision in *Puyallup I* has been sharply criticized as not soundly based and out of line with other Indian cases. *E.g.*, Johnson, *The State Versus Indian Off Reservation Fishing: A United States Supreme Court Error,* 47 WASH L. REV. 207 (1972). It was decided on a record with little or no evidence concerning the negotiation and meaning of the treaties. Furthermore, the biological evidence was nearly all from the perspective of state fish managers. And the Court had before it a stipulation not based in fact which raised the specter of unbridled, destructive Indian fishing. See 391 U.S. at 403 n. 15. By contrast, this case has a complete record of anthropological and biological facts upon which a decision on the propriety of state regulatin of Indian fishing can be made soundly.

Any consideration of the decision below by this Court should include a review of *Puyallup* which was the legal foundation for subjecting respondents' treaty rights to state regulation.

CONCLUSION

The Court should deny the petitions for certiorari. However, should the Court grant the petitions in Nos. 75-588 and 75-592 it should also grant respondents' conditional cross-petition so that there can be a full review of the decision below and its underpinnings.

Respectfully submitted,

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November, 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-588

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-592

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 35-56),[1] is reported at 520 F. 2d 676. The order amending the opinion is set forth at Pet. App. 57-58. The opinion, findings of fact, conclusions of law, injunction and interim plan and stay order of the district court are reported at 384 F. Supp. 312. The opinion alone is reproduced at Pet. App. 59-92.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1975, and a timely petition for rehearing was denied on August 4, 1975. The petitions for a writ of certiorari were filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly declared the treaty rights of the plaintiff tribes.

2. Whether the injunction framed by the district court was an appropriate remedy for the continuing violation of treaty rights that it found.

3. Whether the decision of the court of appeals infringes the Convention of May 26, 1930 (50 Stat. 1355) between the United States and Canada.

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[1] Unless otherwise noted "Pet. App." refers to the Appendix to the petition in No. 75-588, *State of Washington, et al.* v. *United States of America.*

4. Whether the decision of the court of appeals conflicts with the decision of the Washington Superior Court on remand in *State of Washington* v. *Puyallup Tribe, Inc.*, No. 158069, April 8, 1975, and if so, whether review by this Court is appropriate at this time.

5. Whether the evidence supports the findings by the district court that non-Indian reef-net fishermen have pre-empted the usual and accustomed grounds and stations of the Lummi tribe.

TREATIES INVOLVED

The treaties involved are the Treaty of Medicine Creek (10 Stat. 1132); the Treaty of Point Elliott (12 Stat. 927); The Treaty of Point no Point (12 Stat. 933); The Treaty with the Makahs (12 Stat. 939); The Treaty with the Yakimas (12 Stat. 951); and the Treaty of Olympia (12 Stat. 971). With immaterial variations these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

1. The commencement of litigation and findings of fact.

In September 1970, the United States, on its own behalf and as trustee for several Indian Tribes of the State of Washington,[2] brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian Tribes.

The essential questions to be decided were the measure of the fishing rights provided the Tribes by treaty, whether the then-existing state regulatory scheme infringed upon those rights, and, if so, what relief should be granted.

After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, 384 F. Supp. at 348-

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[2] Additional Tribes intervened; the Tribes originally represented by the United States intervened on their own behalf or obtained private counsel. The Washington State Department of Fisheries and Washington State Game Commission, their respective Directors, the Washington Reef Net Owners Association and, in the court of appeals, the Northwest Steelheaders Council of Trout Unlimited, subsequently intervened as additional defendants.

399), which are not contested by the parties [3] and are amply supported by the evidence. Essentially the court found that the treaty Tribes fished for trade as well as subsistence and ceremonial purposes at the time the treaties were made (Findings 2-14, 384 F. Supp. at 350-353). In negotiating the treaties the Tribes were willing to restrict their residence to reservations and were willing to give up claims to large areas of land, but they insisted, and the United States agreed, that they could continue to fish in their usual and accustomed places off the reservations although they would have to share those fisheries with the citizens of the territory (Findings 19-28, 384 F. Supp. at 355-357).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, 384 F. Supp. at 357; Findings 29-34, 384 F. Supp. at 357-358). Many of the Tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, 384 F. Supp. at 358-387).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fisher-

[3] Except those concerning reef-netting near the Lummi reservation, which are contested by the Washington Reef Net Owners Association.

men to the detriment of the treaty-fishermen. More specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, 384 F. Supp. at 388); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, 384 F. Supp. at 358); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194, 195, 384 F. Supp. at 388).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, 384 F. Supp. at 393).

There was no showing that the tribal fishing on reservation, which had been free of State control,[4]

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[4] See Pet. App. 66 and n. 2. See also, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557.

had been detrimental to conservation, although many of these reservations straddle the mouths of major river systems, thus making the essential spawning escapement for any run dependent upon passage through them. As to off-reservation fishing the court noted (Pet. App. 77, n. 26):

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

2. The position of the parties, and the relief requested.

The Washington State Game Commission (Game) argued that except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) is valid.[5] The Washington State Department of Fisheries, contrary to Game, recognized that the treaties in question provided the Tribes with

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[5] Game, Pre-Trial Br., p. 3; Final Pre-Trial Order, pp. 79, 137; see also Game, C.A. Br., pp. 57, 59, 61.

special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). It contended that its regulations are a lawful exercise of State police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384) Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the Tribes.

The Tribes argued that the State is without authority to regulate their fishing, that the State has no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and the State contrary to the treaties, is preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to water rights in *Winters* v. *United States*, 207 U.S. 564 (see, *e.g.*, Muckleshoot, et al., Pre-trial Br., pp. 8-11).

The United States conceded that the State has the power to regulate off-reservation Indian fishing, but only if it is shown that the regulation is reasonable

and necessary for conservation, meets appropriate standards, and does not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that Tribes which can show their ability to regulate themselves should be permitted to do so; and that non-Indian fishing should be regulated in such a manner as to permit the Tribes at their off-reservation fisheries the opportunity to catch as many fish as needed to fill their needs, but because of the requirement of fishing "in common with citizens of the Territory," the Tribes, in their off-reservation fisheries, are entitled to not more than 50 percent of the harvestable portion of the runs involved (Respondent's Post-Trial Br., pp. 81-84).

3. The district court's rulings.

The district court held that each of the plaintiff Tribes under the several treaties at issue had reserved to itself and its members an exclusive right of fishing within their reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory" (Pet. App. 66). As to the scope of the right the court held (Conclusion 20, 384 F. Supp. at 401):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exists in part to provide a volume of fish which

> is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

The court further held that the right of a treaty Tribe to take anadromous fish may be regulated by the State, but only if such regulation (a) does not discriminate against the treaty Tribe's reserved right to fish, (b) meets appropriate due process standards and (c) is shown to be both reasonable and necessary to preserve and maintain the resource (Conclusion 29, 384 F. Supp. at 402).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (384 F. Supp. at 411).

The court reserved the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights for a subsequent hearing, preparation for which is now underway (see 384 F. Supp. at 411).

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[6] See also Conclusions 21-29, 384 F. Supp. at 401-402.

4. The relief granted.

The court held that in light of the facts found, plaintiffs "are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members" (384 F. Supp. at 413).

In the injunction the court recognized the overriding authority of the State in preserving the fishery (Injunction, par. 8, 384 F. Supp. at 415) and provided for state emergency regulations over all tribal off-reservation fishing without prior court approval (Injunction, par. 19, 384 F. Supp. at 417). The court, however, provided that Tribes meeting certain standards (Pet. App. 80-81) would be permitted to regulate their own off-reservation fishing subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the Tribe (Injunction, par. 2, 384 F. Supp. at 414). Tribes not meeting the qualifications would be subject to state regulation in their off-reservation fishing but the State must establish to the satisfaction of the Tribe or, if the Tribe is dissatisfied, the court in advance that its regulations conform to the requirements of the decision (Injunction, par. 3, 384 F. Supp. 414-415).

The court also directed the State to reduce non-Indian fishing of runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty Tribes to the extent nec-

essary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State, the court established a formula for determining the maximum extent of the Tribes' entitlement (Pet. App. 84-87; see also Pet. App. 46-50). The formula provides basically that the Tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in the one-half (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the Tribes as to the types of gear they expect to use and the quantity of fish they expect to be able to take, and to take account of such information and the limits of the Tribes' entitlement in making its predictions and regulations for the coming season (Injunction, par. 17, 384 F. Supp. at 417). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (384 F. Supp. at 420).

5. The decision of the court of appeals.

The court of appeals, in a thorough opinion (Pet. App. 35-56) affirmed. It emphasized that the Tribes, in the treaties giving up their lands, expressly reserved the fishing rights in question and that those rights exist as a matter of federal law. It held (Pet.

App. 42) that the State "[i]n treating Indian fishermen no differently from other citizens of the state * * * has rendered the treaty guarantees nugatory."

Citing *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, the court rejected the Tribes' contention that they could not be subject to state regulation if necessary for conservation; but the court emphasized the burden of the State to show that its regulations, as applied to Indian fisheries, are necessary to conservation (Pet. App. 42-44).

The court further held that the Tribes were entitled to equitable relief (Pet. App. 39). It reviewed and approved the relief granted by the district court (Pet. App. 46-53). The court noted (Pet. App. 46) that "[t]he district court's apportionment does not purport to define property interests in the fish * * *. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run" (emphasis in original). It also noted that (*ibid.*):

> The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

In so holding, however, the court made the important clarification that the adjustment established by the district court for fish taken before they reach the treaty fishing grounds should not take account of fish caught by non-Washington citizens outside the state's jurisdiction (Pet. App. 55). The court remanded the case to the district court's continuing jurisdiction (*ibid.*).

ARGUMENT

1. The special fishing rights reserved to the respondent Tribes in the treaties in question have been recognized by this Court in *United States* v. *Winans*, 198 U.S. 371, and *Tulee* v. *Washington*, 315 U.S. 681, and, more recently, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup* I) and, after remand, *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup* II). These decisions have made clear at least the following propositions as to treaty protected Tribes:

1. The Tribe has an exclusive fishing right on its reservation.
2. It has off-reservation rights which the State is not free to limit as it can the fishing privileges of other citizens.
3. The State may regulate Indian off-reservation fishing but only if the regulation is necessary for conservation and does not seek to accomplish that conservation goal through imposing unfair sacrifices on Indian fishing for the benefit of non-Indian fishing.
4. Both on and off-reservation rights are reserved rights retained by the Indians in the bargain by which they gave up large areas of land; they must be preserved in a meaningful manner, assuring the Indians their share of the available catch according to a formula to be worked out.

But despite these established principles, the Tribes have been repeatedly deprived of the fishing oppor-

tunities provided them by treaty, as the courts below found. See also *Puyallup* II, *supra*, 414 U.S. at 48. The district court's task in this case was thus, as a court of equity, to establish a remedy that would assure the protection of these rights. Part of the remedy, at the request of the State and the United States, was the establishment of a percentage for determining the fishing opportunity of the Tribes as to the runs that pass through their usual and accustomed grounds. Another part of the remedy was to minimize daily conflict by recognizing the responsibility as well as the rights of the Tribes and the duties of cooperation between the Tribes and the State under overall state control.

The State (No. 75-588, Pet. 11-16) and Northwest Steelheaders (No. 75-592, Pet. 25-30) argue that allowing any Indian self-regulation of off-reservation fishing is in direct conflict with *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556. In that case the Court held that a reservation by the Seneca Nation of a privilege of fishing in a lake on land they had ceded to an individual did not exempt them from state regulations prohibiting spear fishing. The Court emphasized the right of the State to regulate fishing and refused to interpret the treaty as having a contrary intent. The Court pointed out that the regulation applied equally to Indians and non-Indians and thus did not discriminate against the Indians (*id.* at 562).

Here, by contrast, treaties agreed to under different circumstances and containing different language, have been held by this Court to create fishing *rights* which can only be limited if necessary for conserva-

tion of the fishery. The Court has specifically rejected the concept that subjecting Indians and non-Indians to identical state regulation is consistent with the treaties (*Puyallup II*, *supra*, 414 U.S. at 48). Moreover, here, in contrast with *Kennedy*, the courts below found abuse by the State in the substance and enforcement of its regulations. In sum, *Kennedy* was not concerned with, and does not prohibit, the kind of specific relief granted in the particular circumstances, and in light of the history, of this case.

Moreover, unlike the situation in *Kennedy*, the district court here (over the objections of the Tribes), carefully preserved the State's right to supersede tribal regulation. Even the Tribes that qualify as self-regulating have an exemption from State regulation only so long as they continue to meet the qualifications and conditions prescribed in the district court's decision (which include reporting to the State and permitting state monitoring) and are always subject to state emergency regulations.

This limited self-regulation permitted the Tribes is consistent with the district court's findings that the Tribes had not threatened conservation in their previous fishing and that (Pet. App. 77):

> "state regulation of off-reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future."

Nor, contrary to the State's contention (No. 75-588, Pet. 14-16) does this limited self-regulation violate principles of territoriality. The treaties establishing the Reservations provided for the off-reservation fishing rights as part of the same bargain, and those grounds, for fishing purposes, are properly considered as analogous to territorial waters of the Reservations and not extra-territorial. In any event, the Tribes, through custom and later through written regulations, have apportioned and regulated the use of this tribal right by their members. This intra-tribal regulation, at least, is a matter of tribal self-government within the competency of the Tribe (see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-173) and the Ninth Circuit, in a prior case, specifically held that a Tribe may enforce such regulations against a tribal member by arrest at the fishing grounds. *Settler* v. *Lameer*, 507 F.2d 231.[7]

2. The State argues (No. 75-588, Pet. 16-19) that the district court's restriction of state regulation conflicts with this Court's decisions in *Puyallup I* and *Puyallup II*, as well as earlier decisions, because those decisions upheld the State's police power "to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and non-discriminatory" (Pet. 16). In this case, however, the State of Washington's regulation of off-reservation fishing by Indians was neither rea-

[7] Even if that were not so, the regulations could be enforced by denial of tribal fishing rights to errant tribal members, thus subjecting such members to direct state jurisdiction.

sonable and necessary for conservation nor non-discriminatory, but in fact constituted a significant and unwarranted diminishment of the Indians' treaty-guaranteed fishing rights. The district court's remedy, as clarified by the court of appeals, is based on the particular abuses revealed by the evidence. As a pattern of cooperation develops, the decree can no doubt be modified, but at the moment it serves to make real the rights recognized by this Court since 1905 in *Winans* and most recently in the *Puyallup* cases. As Judge Burns stated in his concurring opinion below (Pet. App. 56):

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.[8]

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[8] For the reasons expressed above and in paragraph 1, *supra*, the Northwest Steelheaders argument (No. 75-592, Pet. 30-44) that the decision below violates *Milliken* v. *Bradley*, 418 U.S. 717, is not well taken. First, the remedy does not exceed the scope of the violation of rights found by the district court. The court specifically found that state fishing regulations and enforcement had infringed on the off-reservation fishing rights of the Tribes and the injunction was directed to those violations. Compare *Milliken*, 418 U.S. at 744-745.

Second, the court has carefully *preserved* the overriding regulatory power of the State. The parade of horribles stated by the Steelheaders is entirely unrealistic. The State has not sought to regulate on-reservation fishing; thus the un-

3. The State (No. 75-588, Pet. 19-22) and the Steelheaders (No. 75-592, Pet. 45-51) argue that the courts below should not have "quantified Indian fishing rights in terms of a percentage of the harvest" (No. 75-588, Pet. 19). Yet, as we have discussed (p. 8, *supra*), the State requested such a quantification so that escapement goals could be computed. The State, however, suggested an arbitrary one-third division between treaty fishermen, commercial fishermen and sports fishermen—a division having no connection with the intent or language of the treaties and in effect splitting one party to the treaty into two parties. The district court found, and the court of appeals agreed, that the division supported by the treaty, while necessarily being an approximation, must be based on a 50-50 division of the fishing opportunity for those runs that pass through the usual grounds and stations of the tribe (see Pet. App. 84-87, 47-48).[9]

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realistic fear of Indians blocking a river running through their reservation or stretching a net across the outlet of a fish hatchery on such a river (No. 75-592, Pet. 35-36) is not an issue in this case. Moreover, a state emergency regulation could instantly prohibit such an action off-reservation. Nor is regulation of mesh size, times of fishing, and the like prohibited by the decree where necessary for the conservation of any species, even those not the direct subject of the regulation. (Compare No. 75-592, Pet. 41-44.)

[9] Reservation takes are excluded from this figure because the treaties contemplated exclusive Indian fisheries there; off-reservation ceremonial and subsistence fishing were excluded as *de minimis*. The "equitable adjustment" compensates for fish destined for Indian grounds but caught by non-Indians before they reach those grounds. See Pet. App. 46-50.

But it should be clear that the 50 percent guideline is not a guarantee of any harvest. It is simply a readily understandable measure of what portion of the harvest the Tribes as a group may rightly insist they should have a *chance* to take in variable circumstances. The shares worked out for specific runs in particular years with specific Tribes will vary from the guideline, in accordance with the extent of Indian fishing capability, the size of the run, the degree of Indian and non-Indian interest in the run, and the give and take of cooperative operations (see p. 12, *supra*).

The State argues (No. 75-588, Pet. 21-22) that the decree has "financially destroyed" some non-Indian fishermen and has "seriously depressed" the non-Indian fishing industry. The State refers to no data in support of this. Since there is no evidence that the decree has either increased or decreased the total fishery, it is true that to the extent the Indian catch has increased, the non-Indian catch has been decreased. Nothing suggests, however, that the total Indian fishery involved here has increased even to the one-third suggested by the State. Indeed, to the degree that the Indians are few (see No. 75-588, Pet. 20-21) or poor, their ability to catch a significant percentage of a major run is reduced and the decree is adjustable by their actual experiences (see p. 12, *supra*).

4. The State argues (No. 75-588, Pet. 23-28) that the courts below erred in not declaring that the Convention of May 26, 1930, between the United States

and Canada, 50 Stat. 1355, abolished Indian fishing rights as to Fraser River salmon. The Convention established the International Pacific Salmon Fisheries Commission (IPSFC) as a regulatory body and provided for an equal division of fishing rights as to Fraser River salmon between Canada and the United States.

The decision below presents no issue regarding that Convention requiring further review. Both the district court (384 F. Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.

The courts below also correctly held (*ibid.*) that the Convention did not repeal the treaties with the Indians in regard to Fraser River salmon. Under the Convention and implementing statutes and regulations, the fishermen of the United States are entitled to take one-half of the Fraser River sockeye and pink salmon run. Since the treaties between the United States and the Indian Tribes deal only with rights and powers within the United States' jurisdiction, their provisions can apply only to the United States' half. Nothing in the 1930 Convention, however, conflicts with the Tribes' rights to harvest a fair share of the United States' portion if they are part of the runs passing through the Tribe's usual fishing grounds. Since the Convention is thus not in conflict with the earlier treaties it cannot be held to have tacitly re-

pealed them. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413; *United States* v. *Payne*, 264 U.S. 446, 448; *United States* v. *Lee Yen Tai*, 185 U.S. 213, 221; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

The Steelheaders (No. 75-592, Pet. 51-55), apparently joined by the State (No. 75-588, Pet. 27-28), argue that the decision of the court of appeals sanctions district court interference with the foreign policy of the United States through sanctioning disobedience of IPSFC regulations. This is incorrect. As we have demonstrated, both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission they are not sanctioned by the decision under review.[10]

5. The Steelheaders argue (No. 75-592, Pet. 56-59) that the Court should grant review to resolve a possible conflict as to rights to hatchery fish between

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[10] Since the decision, the United States through its membership in IPSFC and through diplomatic channels has sought to have the IPSFC alter its regulations to take account of a special Indian fishery within the United States entitlement, by modification of time and equipment requirements adopted for a more efficient commercial fishery. The post-decision proceedings, which the State characterizes as requiring a violation of IPSFC regulations (No. 75-588, Pet. 27-28), are concerned with the same general subject as this negotiation. The State proceeding is described as presently on appeal to the State Supreme Court (No. 75-588, Pet. 27-28), and review here is thus inappropriate. No direct review of the denial of interim relief by the court of appeals has been sought. Moreover, the specific subject of those suits is now moot (see No. 75-592, Pet. 55) and the general issue may be resolved by negotiation within the IPSFC.

the decision below and that of the state court on remand of *Puyallup II*. But as they point out (No. 75-592, Pet. 56-59), the state superior court decision has been appealed to the Washington Supreme Court, which has not ruled on it. Moreover, this is an issue not yet ruled on by the district court or court of appeals in this case (see p. 10, *supra*). Thus any potential conflict (and there may be none) is not ripe for resolution.

6. The Washington Reef Net Owners Association seek review (No. 75-705, Pet. 2) of the single question whether its members are operating in what were, at treaty times, "usual and accustomed grounds and stations of the Lummis." Both the district court and court of appeals have resolved this largely factual question against petitioners and further review is not warranted. The opinion of the court of appeals, at Pet. App. 50-53, fully discusses and properly rejects petitioner's argument.

CONCLUSION

The remedy provided by the courts below is a careful application of the principles announced by this Court to the detailed facts of this case. It contains its own mechanisms for modification as experience is obtained in its application. For these and the reasons set forth above, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-588, 75-592, 75-705

STATE OF WASHINGTON, et al., *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al., *Respondents,*
and
NORTHWEST STEELHEADER COUNCIL OF TROUT UNLIMITED, *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al.,
and
WASHINGTON REEF NET OWNERS ASSOCIATION, et. al., *Petitioner,*
v.
UNITED STATES OF AMERICA, et al., *Respondents.*

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT—FILED ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILL NETTERS ASSOCIATION, WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, WASHINGTON KELPERS ASSOCIATION, NORTHWEST FISHERIES ASSOCIATION AND WEST COAST TROLLERS ASSOCIATION

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BASIS FOR FILING OF *AMICI CURIAE* BRIEF

This *amici curiae* brief is filed pursuant to Supreme Court Rule 42 and the unanimous consent of all of the parties. The written consents have been filed with this Court.

INTEREST OF *AMICI CURIAE*

Amici curiae are associations of commercial fishermen, vessel owners and processors. Their members fish all waters encompassed by the case area and take all species of sal-

mon which are involved in this case. Combined, their members catch over 90% of the commercial salmon taken by non-Indians in the case area. They employ every method of commercial fishing except reef nets. These include purse seining, gill netting, trolling, onshore trolling, or "kelping", and commercial operation of sport fishing charter boats. Their investment in vessels alone is estimated at more than $150,000,000.00.

Although the economic impact of this decision falls almost entirely on *amici curiae* and its members, they were not parties and those who sought to intervene were denied the right to do so, and continue to be denied the right to intervene under the district court's "continuing jurisdiction".[1] By comparison, the district court has permitted intervention by every Indian tribe that requested the right to do so.

Amici curiae were permitted to appear as *amici curiae* before the Court of Appeals for the Ninth Circuit.

REASONS FOR SUPPORT

1.

Neither the District Court Decision Nor the Circuit Court Decision Are Supportable by the Authorities, Treaty Language, Findings of Fact, or Logic

The different Stevens treaties all utilized approximately the same language:

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1. A group represented by the Washington Reef Netters Owners Association had been permitted to intervene by another district court judge. However, its fishing is limited to a small area of northern Puget Sound and use of stationary gear. Much of that group's concern is a factual issue unique to them: whether present reef net sites and gear are different from Indian reef net sites in treaty times. Purse seiners, gill netters, trollers, "kelpers", charter-boat operators and processors were not parties to the case below.

> "The *right of taking* fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens*. . . ." (Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, R. 1598), and further found that:

> ". . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear." (F.F. at 6, R. 1584)
>
> ". . . George Gibbs noted that:
>
> "'As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.'" (F.F. at p. 10, R. 1588)
>
> ". . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . ." (F.F. 20, p. 16, R. 1594)
>
> ". . . there is no evidence at the time of the treaties

> that either party intended to restrict the other party's fishing . . ." (F.F. 28, at p. 22, R. 1600)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" gave the Indians an inheritable right to catch 50% of the harvestable fish. The only basis for this ruling, other than a reference to treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, p. 19, R. 1597). The full language of this definition reads:

> "1. 1. *Belonging equally to more than one, or to many indefinitely*; as life and sense are common to man and beast; *the common privileges of citizens*; the common wants of man. 2. *Belonging to the public*; *having no separate owner*. The right of a highway is common. 3. General; serving for the use of all . . ." 1828 ed. Webster's American Dictionary of the English language.
>
> (Emphasis supplied)

The first point to remember therefore is that the extraordinary innovations in the decisions and orders below were basically contrived from this dictionary definition without the benefit of any direct legal precedent.

It is to be noted that plaintiffs (respondents before this Court) constantly refer to the district court's decision as giving the Treaty Indians not 50% of the fish but merely

the opportunity to catch up to 50% of the fish. This is a distinction with no difference because the court's decree provides that the non-Indian fishing activity must be cut back until the Indian quota is taken. The quotas are determined by counting the fish caught. As the modern non-Indian fishery is a predominantly marine fishery and as salmon in the case area are mostly taken while migrating towards terminal areas, any closure of the marine fishery means that the salmon are permanently lost to the non-Indian fishermen.

Furthermore, the district court held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this questionable premise in the framing of the court's decree is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with total impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). Furthermore, there is nothing in the language of the treaties, the record or the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians to impose or require

restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

The district court then held that *in addition* to the 50%, the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery whether on or away from their usual and accustomed grounds and stations; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead went off on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is totally foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations.

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as

well as those of the public". In fact, the district court did not, and did not purport to, exercise any discretion—it ruled as a matter of law, based on a misapplied interpretation of a definition in an 1828 English language dictionary, as to the meaning of the treaties. Nor did the district court at any time consider, balance or protect the interests of the non-Indians, the public, the State, or the Nation. Aside from a paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (R. 1601) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no word that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

The granting of a permanent 50% plus ownership in anadromous fish to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to

in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the standpoint of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> ". . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 403 (1968).
>
> "The case was remanded for determination of . . . 'the issue of equal protection implicit in the phrase "in common with"' as used in the Treaty.
>
> * * *
>
> "What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*" (Emphasis supplied) *Department of Game v. Puy-*

allup Tribe, 414 U.S. 44 at 45, 48-49 (1973).

This case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower court decision which was based upon "findings" of Indian intent:

> "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . ." 318 U.S. at 432.

Also:

> "But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law." *United States v. Choctaw Nation*, 179 U.S. 494 at 532-533 (1900).

Also:

> "But the context shows that the Justice meant no

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more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress." *Northwestern Band of Shoshone Indians v. United States,* 324 U.S. 335 at 353 (1945).

2.

The Interpretation and Application of the Treaty, As Affirmed by the Court of Appeals, Is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

> ". . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . ." *Geofray v. Riggs,* 133 U.S. 258 at 267 (1890).

> ". . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . ." *Reid v. Covert,* 354 U.S. 1 at 16 (1957).

The judgment and order in the case before this Court effectively deny non-Indian fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries in Washington waters.

Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of the other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique and arbitrary interpretation of treaty language, the citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's fisheries resources to a small (0.28%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> "... a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. ..." *Martin v. Lessee of Waddell,* 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to exploit the

common fisheries, particularly of the marginal seas.[2] Furthermore, that Enabling Act declares that:

> ". . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation." (Section 8)

The right of all citizens to exploit the common fisheries in the marginal seas has remained fully effective and recognized by the Supreme Court. This right is also subject to the protection of both Art. IV, Section 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States") and the Fourteenth Amendment of the U.S. Constitution, which states:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person the equal protection of the law".

Two significant decisions applying the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment to rights of commercial fishermen are: *Toomer v. Witsell*, 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

In *Toomer* the Court held:

> "[W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . ." 334 U.S. at 402-403.

In *Takahashi*, the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment. The Fourteenth Amendment means that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.

> "[Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so." 334 U.S. at 421.

It is to be noted that the treaty before the court, by use of the word "in common with", itself repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reservations, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. (F.F. 185, p. 102, R. 1680.) Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike)

catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada. (Ex. JX-2a, figures 7 and 8, pp. 00241, 00242)

Under the lower court's ruling, the State is *required* to enact and enforce discriminatory regulations against 99.72% of the population in the case area. The State is to be *forced* to allocate the resources of this 99.72% of its citizens and expend them to place a monopoly control of well over 50% of its harvestable fish in the private hands of a 0.28% ethnic minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the other 99.72% of the citizens in exploiting the fishery at other than Indian's traditional fishing place, and if "a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share." (Ruling on Post-Decision Motions, Exhibit A, p. 3.) The lower court holds 11 state statutes and numerous state regulations void as applied to the Indians, while they must continue to be enforced against non-Indian fishermen.

In short, under the lower court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to and utilization of the common fisheries on the marginal seas.

A further error in the decision below lies in the persistent failure to distinguish between the power of the federal government to prevent a state from interfering with a

treaty, and the lack of power to require a state to appropriate its resources to *implement* a federal treaty. Our research discloses no text or case authority that under the American Constitutional system the federal government, speaking through a treaty or speaking through a district court, can order a state to allocate its resources discriminatorily to discharge a federal treaty promise, particularly where, as here, the resource is not owned by the state in a proprietary sense, but as a custodian for its citizens as a whole. ". . . [T]he ownership is that of the people in their united sovereignty. . . ." *Geer v. Connecticut,* 161 U.S. 519, 529 (1896).

This concept may be tested by example. Of course, the Washington Departments of Fisheries and Game and the state's fish management activity rest solely upon the declaration of the citizens of Washington, expressed in legislation, that these are worthwhile activities. The state has no inherent responsibility to propagate or manage fisheries apart from statute. If the people of Washington through their legislature were to reconsider the worth of these measures, repeal these statutes and withdraw appropriations from Fisheries and Game, with the result that Washington salmon runs were overfished to the point of extinction, it could not lie within the competence of a federal district judge to sign an injunction ordering the re-enactment of these laws, appropriation of moneys, and subsequent executive administration of the laws in the way which that court feels will effectuate his interpretation of a treaty.

It cannot be argued that the decision and orders below do not constitute a reallocation of this resource. The court

orders that the tribes be given preferential rights up to 50% of the harvestable fish, plus reservation and subsistence catches and an "equitable adjustment," and orders that the state and its administrative officers withdraw these fish from the non-Indian fishermen.

This analysis would apply even if it were conceded that the Stevens treaties have the meaning ascribed to them in Final Decision #1. Indeed, if the plaintiff tribes and the court below were correct in their interpretation of the treaty language, the solution could still not constitutionally lie in the direction of issuing orders to the state of Washington mandating the state to give the Indians this public state resource. The remedy for an alleged broken federal promise is federal compensation.

3.

Other Issues Raised By Parties

Amici curiae will not discuss in detail other issues raised by petitioners because the ramifications of these issues and the need for review by this Court is well stated in the petitions. However, we suggest that two of the issues presented by this case are of unusual public significance and particularly merit review.

First, the unsettling impact of the decision below upon the treaties between Canada and the United States regulating the Fraser River sockeye and pink salmon fisheries, and upon the operations of the International Pacific Salmon Fisheries Commissions, is of great public importance.

Second, the unsettling effect of the newly created dual sovereignty between the State of Washington and the numerous Indian Tribes with respect to the salmon fishery,

together with the district court's continuing role as the supreme fisheries administrator, presents a problem of most serious and continuing concern. Both issues transcend in their public importance the bare question of treaty fishing rights.

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish rights of non-Indian citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource. *Amici curiae* urge this Court to grant certiorari on all three petitions. We respectfully urge the Court to order the parties to supplement the record with all of the proceedings before the district court since its initial decision so that the issues and ramifications can be fully understood.

We also respectfully request that *amici curiae* be permitted to present a brief on the merits following the grant of certiorari.

Respectfully submitted,

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